Supreme Court, U.S.
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No. ___

IN THE

# Supreme Court of the United States

STEVEN A. HUDSON, MICHAEL S. MORGAN, VANESSA R. SPENCER, and JOHN A. WINSLOW,
*Petitioners,*

v.

UNITED STATES,
*Respondent*

**On Petition for a Writ of Certiorari To the United States Court of Appeals For the Federal Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Section 4(a) of the Portal-to-Portal Act (Portal Act), 29 U.S.C. § 254(a), excludes certain pre- and post-shift activities from the "statutory workweek" for which Fair Labor Standards Act compensation is due. In *IBP, Inc.* v. *Alvarez*, 546 U.S. 21 (2005), this Court affirmed that an activity qualifies as a "principal activity" – and is therefore not subject to exclusion as "preliminary or postliminary" under § 4(a)(2) – if it is "integral and indispensable" to the performance of the employee's other work duties. See *Steiner* v. *Mitchell*, 350 U.S. 247, 256 (1956).

The questions presented here are:

1. Whether a different, "principal activity" standard applies to cases where the employer asserts an activity is subject to exclusion under § 4(a)(1) of the Act.
2. Whether the principle that FLSA courts are permitted to disregard small quantities of time as "*de minimis*," *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946), authorizes them to make qualitative judgments about the character of work.
3. Whether the settled rules for adjudicating cases involving FLSA exemptions are limited to provisions codified in the "exemptions" section of the Act, 29 U.S.C. § 213.

## LIST OF PARTIES

Petitioners are Steven A. Hudson, Michael S. Morgan, Vanessa R. Spencer, and John A. Winslow.

The Respondent is the United States.

In addition, Terry J. Easter and Michael Eggleston were plaintiffs in the Court of Federal Claims, but were not parties to the appeal nor this petition.

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## OPINIONS BELOW

The decision of the Federal Circuit, reported at 575 F.3d 1332, is reprinted in the Appendix ("App.") at 1a. The opinion of the Court of Federal Claims, reported at 83 Fed. Cl. 236, is reprinted at 18a.

## JURISDICTION

The Court of Appeals' judgment was entered on August 5, 2009. The Chief Justice extended the time to file to December18, 2009. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 4 of the Portal-to-Portal Act ("Portal Act") provides

> (a) Activities not compensable
>
> Except as provided in subsection (b) of this section, no employer shall be subject to any liability * * * under the Fair Labor Standards Act * * * on account of the failure of such employer * * * to pay an employee overtime compensation, for or on account of any of the following activities * * *–
>
> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities * * * *

29 U.S.C. § 254(a)

Other pertinent statutory and administrative materials are reproduced in the Appendix, beginning at 53a.

## STATEMENT

This case involves claims for Fair Labor Standards Act (FLSA) overtime pay by individuals employed at three federal law enforcement agencies. The Federal Circuit held that, under its prior interpretation of § 4(a)(1) of the Portal Act, see *Bobo* v. *United States*, 136 F.3d 1465 (Fed. Cir. 1998); *Adams* v. *United States*, 471 F.3d 1321 (Fed. Cir. 2006), cert. denied, 128 S. Ct. 866 (2008), petitioners' driving of specially-modified government vehicles and transporting work equipment directly to their homes and back, per their employer's directive and subject to stringent restrictions, was not compensable.

### A. Statutory And Regulatory Framework

1. The FLSA reflects "a Congressional intention to guarantee either regular or overtime compensation for *all* actual work or employment." *Tenn. Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) (emphasis added).

Although the Act generally requires overtime pay for employment beyond a forty-hour "workweek," 29 U.S.C. § 207(a), it does not define "work" or "workweek." In *Tennessee Coal*, this Court described "work" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." 321 U.S. at 598; see also *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944) (clarifying that waiting and other non-exertional activities can be compensable "work"). In *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680

(1946), the Court again defined the "statutory workweek" expansively, holding that time spent turning on lights, putting on aprons, and removing shirts, was "work" for which the statute required pay. *Id.* at 692-93.

2. In 1947, Congress, concerned by the number and magnitude of backpay claims facing employers, including many arising from war-time production efforts, enacted the Portal Act. Section 2 of that Act, 29 U.S.C. § 252, extinguished most then-existing FLSA claims. Section 4, which governs post-enactment cases, is far more circumscribed: it "except[s] two activities that had been treated as compensable under [prior] cases: walking on the employer's premises to and from the actual place of performance of the principal activity of the employee [§ 4(a)(1)], and activities that are 'preliminary or postliminary' to that principal activity [§ 4(a)(2)]." *Alvarez*, 546 U.S. at 27. See *Reich* v. *New York City Trans. Auth.*, 45 F.3d 646, 649 (2d Cir. 1995) ("*Reich*") (describing provision as "intended to relieve employers from liability for preliminaries, most of them relatively effortless, that were thought to fall outside the conventional expectations and customs of compensation").

3. This Court first considered the Portal Act in two 1956 decisions, *Steiner* v. *Mitchell*, 350 U.S. 247, and *Mitchell* v. *King Packing Co.*, 350 U.S. 260, which rejected employers' claims that § 4(a)(2)'s exception for "preliminary or postliminary" activities relieved them of the obligation to pay battery plant workers (*Steiner*) for time spent showering and changing into protective clothes and butchers (*King Packing*), for time spent sharpening knives pre-shift. The § 4(a)(2) exception, the Court held, reaches only pre- or post-shift activities

that are not "integral and indispensable," 350 U.S. at 255, to the work the employee is hired to perform.

*Alvarez* rejected claims by meatpacker employers that Section 4 allowed them not to pay employees for time spent walking between the area where they donned and doffed protective gear and their places on the production floor. The employers contended that even though the donning had been held to satisfy the *Steiner* standard, the walking time could be excluded under § 4(a)(1). Describing the *Steiner* test as "settled law for several decades," *id.* at 32, the Court clarified that any activity that satisfies the "integral and indispensable" test is itself a "principal activity" – and that that term must have the same meaning in both parts of Section 4(a). Accordingly, the rule for "travel" occurring *during* the workday, see 29 C.F.R. § 790.7(c), not the Portal Act exception, governed. 546 U.S. at 37.

4. The Department of Labor, entrusted by Congress with responsibility for administering and enforcing the FLSA, has issued regulations – many in place for decades – addressing which activities must be included in compensable "hours worked," see 29 C.F.R. pt. 785, and which ones are subject to exclusion under the Portal Act. See *Id.* pt. 790.

Among these are provisions establishing and explaining the "integral and indispensable" test, *id.* §§ 790.7, 790.8, and identifying activities not subject to the § 4(a)(1) exclusion, *e.g.*, *id.* § 790.7(d) ("traveling [that] is not segregable from the simultaneous performance of * * * assigned work," such as "carrying * * * heavy equipment"). The regulations state, *inter alia*, that "normal home to work travel is not worktime," *id.* § 785.35, but that an employee

"required * * * [to] drive a truck, bus, [or] automobile * * * is working while riding," 29 C.F.R. § 785.41.

5. Congress brought federal employees within the FLSA in 1974, Pub. L. No. 93-259, assigning administration responsibility to the Civil Service Commission (and later, the Office of Personnel Management), but directing that the Act's protections for federal employees be coextensive with those in others sectors, save for where features distinct to the federal workplace warrant different rules. See H.R. Rep. 93-913, 93rd Cong., 2d Sess. 28.

Consistent with that directive, OPM regulations largely track those of the Labor Department. See 5 C.F.R. § 551.401(a) (defining "hours of work"); *id.* § 552.422(b) ("normal 'home to work' travel * * * is not hours of work"); *id.* § 552.422(a)(2) (work includes time "[a]n employee [is]* * * required to drive a vehicle or perform other work while traveling").

When the Act was first passed, the Civil Service Commission issued a series of Federal Personnel System Manual (FPM) Letters, providing detailed, government-wide instructions concerning the statute's application.[1] One of these, FPM Letter 551-10, titled "Travel Time as 'Hours of Work' Under FLSA," states, *inter alia*, that when an FLSA-covered employee drives a "[g]overnment vehicle home (as a requirement of the employing agency) to respond to emergency calls immediately from his/her home," "[a]ll time spent driving the vehicle home to work (work to home) is hours worked." App. 63a-64a (Table 1 & n.1).

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[1] Although the Federal Personnel *Manual* was "sunsetted" at the end of 1993 and 1994, courts continue to cite and rely on FPM *Letters*. See, *e.g.*, *Christofferson* v. *United States*, 64 Fed. Cl. 316, 322 (2005).

That rule was reaffirmed by OPM after notice-and-comment rulemaking, see 45 Fed. Reg. 85,659, 85,661 (Dec. 30, 1980), with the agency describing it as "consistent with the rulings, interpretations, and opinions of the Department of Labor and the courts in the private sector." *Id.*

**B. The Federal Circuit's Construction**

1. In *Bobo*, 136 F.3d 1465 (1998), the Federal Circuit held that § 4(a)(1) relieved the Government of the obligation to pay Border Patrol canine officers for time spent driving specially-equipped government vehicles, transporting the dogs between their work locations and homes, where they were required to board and care for the dogs. The agents were required to monitor radios while driving and to stop to attend to the canines' needs, and were prohibited from making personal stops. See *id.* at 1467.

The Federal Circuit first recognized that "the FLSA * * * requires federal agencies to pay compensation for '[a]ll time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency,'" 136 F.3d at 1467 (quoting 5 C.F.R. § 551.401(a)), but that the Portal Act creates "an exception to [this] general rule."

In holding that the Government was entitled to the § 4(a)(1) exception, *Bobo* announced that in deciding cases under "[t]his provision of the Portal-to-Portal Act," it would adopt "the interpretation * * * set forth in [the Second Circuit's] decision in *Reich*," *id.* at 1468, – which had ruled for the employer in a case also involving "the commuting time of police dog handlers," *id.* at 1467.

The *Bobo* court then quoted what it identified as the Second Circuit's statement of the governing rule:

> The more the preliminary (or postliminary) activity is undertaken for the employer's benefit, the more indispensable it is to the primary goal of the employee's work, and the less choice the employee has in the matter, the more likely such work will be found to be compensable * * * The ability of the employer to maintain records of such time expended is a factor. And, where the compensable preliminary work is truly minimal, it is the policy of the law to disregard it.

*Id.* (quoting 45 F.3d at 650). The decision did not further address how these considerations applied to the plaintiffs' driving, instead moving (as had the *Reich* decision) to examining the various restrictions and burdens on the agents' travel between home and work. While the prohibition on personal stops and other restrictions were "compulsory, for the benefit of the INS, and closely related to [plaintiffs'] * * * principal work activities," the court held, they were "insufficient to pass the *de minimis* threshold," citing (as had the *Reich* opinion) *Anderson* for the principle that under the FLSA "'trifles may be disregarded.'" *Id.* at 1468. The court then held that the "other * * * burdens, such as the need to make stops for the dogs * * * [and] the requirement to sign on to the radio, * * * did not pass the *de minimis* threshold either,"*id.* And *Bobo* did not treat the burdens and restrictions inherent in the required driving itself as relevant in this analysis.

2. The Federal Circuit applied the *Bobo* rule in *Adams*, one chapter in long-running litigation involving thousands of criminal investigators employed (in various positions and GS-levels) at a number of federal agencies, claiming to have been wrongly classified as FLSA-exempt and thereby denied overtime pay.

The Government reached settlements with plaintiff subgroups at various times, and after *Bobo* refused to include time spent on home-to-work driving in backpay calculations, insisting that the compensability question be resolved judicially. On this point, although there was substantial overlap between the *Adams* plaintiffs' circumstances and the *Bobo* agents' – they were required to drive employer vehicles between home and work each day and subject to stringent restrictions – the *reason* the driving was required in *Adams* was different: to enable the investigators to respond to law enforcement emergencies directly from home, in their work vehicles, a circumstance that Letter 551-10 specifically declared entitled FLSA-covered workers to compensation.

The Federal Circuit held for the Government, treating plaintiffs' claims as controlled by *Bobo's* "teach[ing]": that "commuting done for the employer's benefit, under the employer's rules, is noncompensable" by operation of § 4(a)(1), unless the employee performs "additional legally cognizable work while driving," 471 F.3d at 1328, and describing the prohibitions on personal use and carrying passengers as "basically identical to" those held *de minimis* as a matter of law in *Bobo*, *id.* at 1326.

The *Adams* decision addressed three matters *Bobo* had not. The opinion noted the intervening decision in *Alvarez*, but did not treat it as especially significant, indicating that the "specific" rule for "vehicular travel" under the Portal Act could be found in statutory language that was not before the Court in *Alvarez*. See *Id.* at 1325.[2] The court also rejected the employees'

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[2]*Adams* cited language that Congress had added to the Portal Act in 1996 Legislation addressing the legal effect of

contention that, under *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 196-199 (1974), and other FLSA cases, the employer should bear the burden of establishing its entitlement to the § 4(a)(1) exception, reasoning that the "Portal Act does not create an 'exemption' in the * * * sense * * * used" in the cited decisions, which involved provisions that "total[ly] exclude[d] a particular *worker* or workers from certain FLSA protections," while the Portal Act "exclu[des] * * * * only some *activities*." 471 F.3d at 1326 (emphasis original).

Finally, *Adams* addressed, albeit indirectly, Letter 551-10 – in the course of rejecting some plaintiffs' contention that they were entitled to pay under § 4(*b*), because their agencies had a "custom or practice" of paying FLSA-covered workers for the activity at issue. See 29 U.S.C. § 254(b). The court pronounced plaintiffs' understanding of the Letter correct, but rejected their interpretation of Section 4(b).

3. Facts and Proceedings Below

Petitioners, employees of the Bureau of Alcohol Tobacco and Firearms, the Department of Homeland Security, and the United States Secret Service, brought this suit in 2004, claiming that their positions had been wrongly classified as FLSA-exempt and seeking backpay and damages. In keeping with the pattern described above, the parties settled most of these claims, reserving for "further litigation" – stayed

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employer-employee *agreements* concerning the use of employer cars. See Pub. L. 104-188 § 2102 (the "Employee Commuting Flexibility Act" or "ECFA"). As the decision below recognized, however, that provision does not govern cases, like this one (and *Adams*) in which there is no such agreement. See App. 15a (noting Government's concession).

pending the resolution of *Adams* – petitioners' "FLSA claims arising from time solely spent driving a Government vehicle between home and work."

After certiorari was denied in *Adams*, the Government moved for judgment on the pleadings. Petitioners resisted that motion on both factual and legal grounds, noting that, unlike the employees described in the *Bobo* and *Adams* opinions, their driving entailed hauling large work equipment in government vehicles specially adapted for that purpose, see C.A. J.A. 99 (Petitioner Morgan's declaration that he regularly must transport more than 1000 pounds of equipment in specially-outfitted truck), and arguing that the Federal Circuit's prior decisions did not preclude ruling in their favor, based on the Labor Department's conflicting interpretation of the FLSA and Portal Act, see *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *Billings* v. *United States*, 322 F.3d 1328 (Fed. Cir. 2003).

Both the Court of Federal Claims and the Federal Circuit ruled for the Government, relying primarily on general principles of *stare decisis*, see App. 8a (noting trial court's obligation to apply "the Federal Circuit's interpretation of the FLSA and the exception to it created by the Portal-to-Portal Act, as stated in *Bobo* and *Adams*[]"); *id.* at 29a (highlighting appellate court panel's obligation to follow circuit precedent).

The appeals court denied that it had the broad authority petitioners claimed to independently decide the issues addressed in *Adams* and *Bobo*, and it then rejected the other premise of petitioners' argument: that the *Bobo* rule actually conflicted with OPM's or, especially, the Labor Department's, interpretation of

the law.[3] The court viewed both an OPM regulation, 5 C.F.R. § 551.422(b), and a guidance on the agency's website as strongly supporting the *Bobo* rule, see App. 12a (citing Hours of Work for Travel, http:// www.opm.gov/oca/worksch/ html/ travel. asp). While acknowledging the importance of congruence between federal and private sector FLSA regulations, it denied there was any substantial conflict between *Bobo*'s interpretation of the Portal Act and the Labor Department's, noting, *inter alia*, regulations recognizing that '[n]ormal home to work travel is not compensable,'" 29 C.F.R. § 553.221(e), and disputing petitioners' reading of other agency regulations and interpretative materials, App. 13a-16a.

The court reaffirmed the *Adams* panel's rejection of the burden-shifting and narrow construction rules, explaining that liability in these cases does not "turn[] on the existence of an exemption from the FLSA, but on whether the driving at issue constitute[s] 'compensable work under the statute,'" an issue on which FLSA plaintiffs bear the burden. See *id.* at 16a & n.1 (citing *Adams* and *Anderson*).

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[3]The court explained (1) that *Brand X* – which held that a federal court should not adhere to its prior interpretation of an ambiguous statute when presented with a reasonable contrary agency construction -- had involved regulations issued "*after* * * * the initial judicial decision," App. 11a (emphasis added) and (2) that, unlike in *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158 (2007), the *Adams* opinion had not expressly "*reject[ed]* * * * [any] regulatory interpretation," *id.* (emphasis added), noting that any "failure to advert to * * * regulations" could "plausibl[y be] expl[ained]" as an implicit judgment that they "would not have altered the court's decision," *id.*.

## REASONS FOR GRANTING THE PETITION

In the decision below, the Federal Circuit reaffirmed a construction of § 4(a)(1) that is irreconcilable with this Court's governing precedents and those of many courts of appeals and that disregards the longstanding contrary interpretation of the Department of Labor. This Court should grant review to settle the correct meaning of this important statute and ensure that federal employees, whose FLSA rights are governed by Federal Circuit law, will not continue to be denied their right to be paid for "all actual work."

This is the third case in which the Federal Circuit has construed Section 4(a)(1) of the Portal Act to relieve an employer of any obligation to compensate an employee for an activity (driving a work vehicle home and back) that is required by the employer "done for the employer's benefit [and] under the employer's rules" – unless the employee performs substantial "labor *beyond*," the employer-mandated driving itself. *Adams*, 471 F.3d at 1328 (emphasis added).

That interpretation is irreconcilable with the central teaching of this Court's decision in *Alvarez*, which makes plain that claims to the § 4(a)(1) exception must be tested under the same standard that governs those under § 4(a)(2): *i.e.*, whether the activity is "integral and indispensable," 546 U.S. at 33-34, a standard that the driving at issue in this and other Federal Circuit cases (as described by the court's own opinions) undeniably meets. Nor is the Federal Circuit's rule faithful to *Steiner*. That case, which involved activity (showering and changing clothes) that ordinarily was not compensable work, looked at the activity itself to

determine whether it was "principal" (without demanding "labor beyond" it).

The Federal Circuit rule is also in direct conflict with decisions of at least four courts of appeals, including the Second Circuit, whose statutory interpretation the *Bobo* court indicated it meant to emulate. Those courts have, properly, applied a single "principal activity" standard in deciding claims of exclusions under both paragraphs of Section 4(a). As documented below, decisions that have applied the "integral and indispensable" standard to § 4(a)(1) claims have granted employees relief in cases that are factually indistinguishable from (or less compelling than) ones the Federal Circuit has held state no viable claim. Indeed, what the Second Circuit has recently described as "[pushing] the outer limits" of what an employer may require of employees without paying them would be a "trifle" under the *Bobo* rule.

The Federal Circuit rule also conflicts sharply with the longstanding interpretation of the Department of Labor. Although the decision below read the language of one regulation as consistent with *Bobo*, the Labor Department has long championed a unitary approach to Section 4(a); and it has given that regulation and other relevant ones an entirely different interpretation; and the premises of the Federal Circuit rule, that employer-required *driving* is not "legally cognizable work" and that the exertions, burdens and restrictions inherent in required driving of a work vehicle may be disregarded are all contrary to the longstanding administrative interpretation.

Embedded in the Federal Circuit's rule, finally, are two other errors whose significance extends beyond the particular provision at issue here. First, the Federal

Circuit loosed the "de minimis" principle of *Anderson* from its moorings, converting a narrow, objective, and quantity-based test into a free-form power of courts to pronounce judgments as a matter of law about the *character* of the requirements employers impose and, as here, to make such judgments in an impermissibly piecemeal way. Finally, the Federal Circuit has held that entirely different rules should govern adjudication of FLSA "exclusions" and "exemptions," an approach that has no support in this Court's precedent or in reason.

I. The Federal Circuit's Interpretation of The Portal Act Is Irreconcilable With This Court's

*Steiner* held that the Section 4(a)(2) exclusion for "preliminary [and] postliminary activities" does not relieve the employer of its obligation to pay for pre- or post-shift activities that are "integral and indispensable" to the work the employee is hired to perform. Although that decision left some room for concluding that the "integral and indispensable" test did not apply, or applied differently, to the Section 4(a)(1) exclusion, see *Spencer* v. *Auditor of Special Accounts*, 1990 WL 8034 *4 (E.D. Ky. 1990), a two-tier reading of Section 4(a) cannot survive *Alvarez*.

The Court there settled that the "integral and indispensable" test is a gloss on "principal activity or activities" – a term that appears in *both* paragraphs – *and* that "[t]here is no plausible argument that these terms mean different things in § 4(a)(2) and in § 4(a)(1)," 546 U.S. at 33-34. Thus, the clear import of *Alvarez* is that "*any* activity that is 'integral and indispensable'" – including required home-to-work driving – "is itself a 'principal activity," *id.* at 37.

The Federal Circuit's construction cannot be squared with that holding. As noted above, the (pre-*Alvarez*) decision in *Bobo* did not purport to apply *Steiner*'s principal activity test, and *Adams*, far from grappling with *Alvarez*'s significance, treated it as limited to its particular facts and at least suggested, incorrectly, that § 4(a)(1) no longer governed claims for employer-required "vehicular travel." 471 F.3d at 1325. See n.2, *supra*.

More important, the *Bobo* rule is facially incompatible with every formulation of the "integral and indispensable" standard, including *Steiner*'s: what the Federal Circuit holds insufficient "to state a viable claim" – an activity "done for the employer's benefit [and] under the employer's rules," 471 F.3d at 1328 – is the *definition* of "principal activity" in other jurisdictions. Compare, *e.g.*, *Dunlop*, v. *City Electric, Inc.*, 527 F.2d 394, 398 (5th Cir. 1976) (Section 4(a) excludes only activities "undertaken 'for [employees'] own convenience, not being required by the employer and not being necessary for the performance of their duties for the employer").

And *Steiner* did not look for "labor beyond the mere act of [clothes-changing]," 471 F.3d at 1328, to decide whether that activity was "principal"; it made the "integral and indispensable" determination based on the activity itself. The drastically different rule here cannot be grounded on factual distinctions: *Steiner* too involved an activity (showering and changing clothes) that was "normally" not compensable work, see 29 C.F.R. § 790.7(g) (the activity here – employer-directed driving – obviously entails more exertion and greater burdens than that held compensable in *Steiner*). Nor does the element of employee benefit distinguish the

activity here from those held to be "principal" in *Steiner* (or *Alvarez*).

If, as *Alvarez* held, "principal activity" means the same thing under § 4(a)(1) and § 4(a)(2), *i.e.*, one that is "integral and indispensable," the Federal Circuit's construction of the former provision may not stand.

## II. The Federal Circuit's Rule Conflicts Starkly With Governing Law In Other Courts of Appeals

### A. Courts of Appeals Have Long Applied The (Correct) *Steiner* Test In § 4(a)(1) Cases

Although the Federal Circuit is not alone in applying this two-tiered approach to Section 4(a), see *Aiken* v. *City of Memphis* 190 F.3d 753, 758 (6th Cir. 1999) (citing *Bobo*); see also *Rutti* v. *LoJack Corp., Inc*, 578 F.3d 1084 (9th Cir. 2009) (citing *Bobo* and *Adams* favorably in addressing a related issue), other courts of appeals have long followed the contrary, correct rule, applying the same "principal activity" test to the § 4(a)(1) and § 4(a)(2) exclusions.[4]

In a case decided two years after *Steiner*, *D A & S Oil Well Servicing, Inc.* v. *Mitchell*, 262 F.2d 552 (10th Cir. 1958), the Tenth Circuit held, in a suit brought by the Secretary of Labor, that the time workers spent driving their employer's trucks to and from a job site could not be excluded under § 4(a)(1), applying the "integral and indispensable" standard. *Id.* at 554-545.

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[4] *Rutti* held that the employer was not required to pay for driving, but relied on a (doubtful) interpretation of ECFA, not § 4(a)(1), to reach that result. See n.2, *supra*. An earlier, non-precedential opinion, *Dole* v. *Flint Engineering & Const. Co.*, 914 F.2d 262 (9th Cir. 1990) (table), applied the "integral and indispensable" test, in holding that § 4(a)(1) did not relieve an employer of the obligation to pay workers for driving its trucks home.

Precedent-setting decisions of the First and Fifth Circuits, also Labor Department enforcement actions, did the same. See *Mitchell* v. *Mitchell Truck Line, Inc.*, 286 F. 2d 721 (5th Cir. 1961) (concluding that driving and other pre- and post-shift "activities were * * * such an integral part and so indispensable to the employees' main job as to be outside of the Portal-to-Portal exemption"); *Dunlop* v. *E. R. Field, Inc.*, 495 F.2d 749 (1st Cir. 1974) (holding driving employer's trucks to and from work site was not subject to § 4(a)(1) exclusion, citing *D A & S* and factual finding that the driving was "'an integral and indispensable function of the defendant business'").

Later decisions of these courts have adhered to and amplified this approach. Thus, in *Baker*, the Tenth Circuit overturned a jury's verdict allowing an employer to not pay employees for time spent driving its trucks home from work each day. See 146 F.3d at 1216. "Because travel time meeting the 'integral and indispensable' test must be compensated pursuant to the FLSA," the court held, the dispositive question was whether the plaintiffs work-to-home driving at issue met that test – or whether it was "[n]ormal travel from home to work," *id.* at 1218 (quoting 29 C.F.R. § 785.35). See also *United Transp. Union* v. *Albuquerque*, 178 F.3d 1109, 1120 (10th Cir. 1999) (holding time spent riding to and from "split shifts," could not be excepted under § 4(a)(1), because it was "integral and indispensable to [the employer's] system of dispatching and relieving drivers," but post-shift riding could be, as employees were free to "go home any way they choose, by any means they choose"); *Vega* v. *Gasper*, 36 F.3d 417, 425 (5th Cir. 1994) (affirming that "[t]ravel that is an indispensable part of performing one's job is a principal activity and is

compensable"); *Karr* v. *City of Beaumont*, 950 F. Supp. 1317, 1323 (E.D. Tex. 1997) (holding, under Fifth Circuit law, that plaintiffs' transportation of police dogs was "[a]n integral and indispensable part of [their] work" and therefore outside § 4(a)(1)).[5]

A closely reasoned (though not precedential) decision of the Eleventh Circuit, *Burton* v. *Hillsborough County*, 181 Fed. Appx. 829 (11th Cir. 2006), also relied on the integral and indispensable test to hold that 4(a)(1) did not relieve employers of an obligation to compensation for pre- and post-shift driving. The court affirmed summary judgment for the employees, quoting *Steiner* and *Dunlop*, and emphasizing that "without the county vehicles the employees could not perform the principal activities for which they were employed." *Id.*; cf. *Bonilla* v. *Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 & n.7 (11th Cir. 2007) (citing *Burton*, but distinguishing cases on their facts).

Both as formulated and as applied, these standards could hardly be more different from the *Bobo* rule. The Tenth Circuit in *Baker* did not view what the Federal Circuit makes mandatory – "additional work" during

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[5] *Vega* rejected compensation under the integral and indispensable test, in part because the workers "were *not* required to use [the employer's] buses to get to work in the morning," 36 F.3d at 425, and "performed no work prior to or while riding" them, *id.* *Smith* v. *Aztec Well Servicing Co.*, 462 F.3d 1274 (10th Cir. 2006), is to similar effect: the decision recognized that "traveling * * * constitute[s] 'work' if it is 'an integral and indispensable part of the principal activities for which [plaintiff] [is] employed,'" but held the driving at issue did not qualify, because employees, who car-pooled, were free to choose their means of traveling to the work site and "free to spend [the riding] time as they wished," *id.* at 1281.

the drive – as even *relevant* to the FLSA analysis. And the questions the Tenth Circuit identified as determining whether driving is compensable or "normal" are ones that indisputably would be answered in petitioners' favor:

> [1] whether Plaintiffs were truly free to go where they wanted at the end of the work day and to use whatever method of transportation they chose * * * * [2] whether Plaintiffs could have left the [equipment] at the work site * * * or [3] whether Plaintiffs were required, by policy or practical reality, to transport the [equipment] from the work site each day to refuel and restock.

*Id.* at 1219. See *Baker*, Civ. No. 93-140 (D. N.M. Nov. 18, 1998) at 18-19 (unpublished opinion) (holding, on remand, that the work-to-home driving was compensable "because it [was] integral and indispensable to [the] principal activities for which [employees] were hired").[6]

The magnitude and practical significance of these conflicting standards can be seen in the decided cases: *Bobo* and *Aiken* held that, under § 4(a)(1), canine officers' transporting dogs between work and home – required by the employer, in special vehicles, and subject to restrictions – does not raise a "valid or even triable claim to compensation under the FLSA," 136

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[6]Indeed, it is even unclear how a court could rule for the employer in this case under the rule that *Bobo* seemed to approve, *i.e.*, that activity is "'more likely * * * to be found to be compensable,' '[t]he more * * * [it] is undertaken for the employer's benefit, the more indispensable it is to the primary goal of the employee's work, and the less choice the employee has in the matter'" 136 at 1467 (quoting *Reich*, 45 F.3d at 650).

F.3d at 1468; but courts faithfully applying the *Steiner* test in highly similar circumstances, have granted *employees* judgment as a matter of law. See *Karr*, 950 F. Supp. at 1323; *Graham* v. *City of Chicago,* 828 F. Supp. 576 (N.D. Ill.1993).

In fact, the driving held noncompensable as a matter of law under the Federal Circuit rule falls more readily into the "principal activity" category than activities other circuits have held require pay, notwithstanding § 4(a)(1). First, as explained below, this case involves *driving* for the employer's benefit – not merely "riding," cf. *UTU,* 178 F.3d at 1120. It is compulsory, compare *Field*, 495 F.2d at 751 (upholding compensation for employee who could "have reached the jobsite by personal transportation" – because he "was in fact performing services for the benefit of the employer" by driving employer's truck).

In petitioners' case, transporting the vehicles and equipment *home* is specifically necessary and required so petitioners could fulfill job responsibilities – *i.e.*, emergency response in the work vehicle with their work equipment – from there. Compare *Baker* v. *GTE North Inc.*, 927 F. Supp. 1104, 1113 (N.D. Ind. 1996) (ruling for employees, but noting that "parking the vehicles at home" was for the "employees' convenience"), *rev'd on other grounds*, 110 F.3d 28 (7th Cir. 1997); *Flint Engineering*, 914 F.2d 262, *3 (employees "were required to take the trucks away from the oil field," but not to their homes). And petitioners here, like the unsuccessful *Bobo* litigants – but unlike the *prevailing* employees in *Flint* or *UTU*, have job responsibilities during the drive and are subject to restrictions that had no analog in those cases, see *infra*.

Even the lone circumstance arguably on the other side of the ledger, the benefit to petitioners of departing from and arriving *home* – is, because of the restrictions, more equivocal than the Federal Circuit's decisions assume. Just as courts have taken account of the inconvenience of switching cars at an employer-designated lot, see *Burton*, 181 Fed. Appx. at 837, for an employee who needs to pick up a child or attend to personal business, the requirement to drive a work vehicle *home* and switch cars can be an equally "inconvenient detour," *id.* 181 Fed. Appx. 829. Cf. 29 C.F.R. § 553.221(d) ("Time spent at home on call may * * * be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits").

Of course, even a significant, direct benefit to the employee does not make an activity noncompensable under the FLSA (or the Portal Act). The decisions in *Alvarez* and *Steiner* did not reflect a finding that donning protective gear is not beneficial to employees. Cf. *Republican Publishing Co.* v. *American Newspaper Guild*, 172 F.2d 943, 945 (1st Cir. 1949) (theater reviewer does compensable work when attending performance).

B. The Federal Circuit Rule Is Contrary To, Not Supported By, The Law of The Second Circuit

Especially striking is the extent to which the Federal Circuit's restrictive "principal activity" rule conflicts with the law of the *Second Circuit*, the court whose interpretation of § 4(a)(1) *Bobo* described itself as adopting.

As noted above, the *Bobo* opinion (which did not have the benefit of *Alvarez*) did not arrive at its standard through independent consideration of

statutory and regulatory text. Instead, it repeatedly described the construction of § 4(a)(1) it announced as based on "agreement with" the Second Circuit's "construction of that provision in *Reich*," 136 F.3d at 1468; it quoted at length from what it described as *Reich's* "expla[nation]" of that provision; and it ultimately ruled for the employer (as had the Second Circuit), on the ground that the burdens and restrictions *beyond* driving were "*de minimis*." *Id.* at 1467-68.

In *Adams*, the trial court, confronted with OPM's longstanding view that precisely the activity at issue – driving in order to enable emergency response – was compensable, expressed doubt that the "*Bobo* [] court would have deferred to the FPM Letter's guidance," reasoning that doing so would have precipitated a "direct conflict with *Reich*"– a step, that court observed, "the Federal Circuit would not have lightly [taken]." 65 Fed. Cl. 217, 239.

But as the Second Circuit opinion in *Reich* indicates – and that court's recent decision in *Singh* v. *City of New York*, 524 F.3d 361 (2d. Cir. 2008) (Sotomayor, J.), makes even more plain, the Second Circuit does not follow the rule *Bobo* adopted. Indeed, it was by *rejecting* plaintiffs' claims in *Bobo* and *Adams* that the Federal Circuit precipitated a conflict with that court.

As the Second Circuit explained, its decision in *Reich* did not announce *any* interpretation of the "provision of the * * * Portal Act," 136 F.3d at 1467, the Federal Circuit construed in *Bobo*, let alone a two-tiered one. On the contrary, *Singh* explained, the decision in "*Reich left open* * * * whether the handlers' transportation of the dogs to work was [a principal activity] * * * for purposes of the Portal-to-Portal Act,"

524 F.3d at 370 n.7 (emphasis added). And the opinion expressly affirmed that, consistent with *Alvarez*, the Second Circuit's test under Section 4(a)(1) is whether the activity at issue is an "integral and indispensable part" of employees' other work duties. *Id.* at 370. Indeed, *dictum* in the same opinion indicates that the Secretary could have *succeeded* on the Portal Act issue in *Reich* had the Second Circuit reached it. *Singh* described the "transportation of the dogs" in *Reich* as "in many ways analogous" to the *Singh* plaintiffs' transportation of documents, suggesting that both activities were "essential for [the] * * * proper[] complet[ion] of [emloyees]"[duties]" – and thereby at least "arguably" "integral and indispensable," *id.* n.7.

The Second Circuit, moreover, did not hold in *Reich*, as the Federal Circuit would, that employer-required driving was not itself labor or "legally cognizable work" or that burdens and restrictions inherent in such driving could be disregarded. As the opinion makes clear, the case *did not involve required driving*. The officers in *Reich*, unlike those in *Bobo*, were not required to drive special employer vehicles. Indeed, "the handlers were not required to drive," at all. 45 F.3d at 651. Nor, apparently, were they prevented from "mak[ing] stops for personal errands." 839 F. Supp. at 177 (citing testimony).

Thus, to the extent the Second Circuit focused on burdens and restrictions "in addition to" driving, it was in addressing an issue the Federal Circuit (properly) treated as resolved in the *Bobo plaintiffs' favor*: whether they were engaged in "work" under the FLSA, 524 F.3d at 370 n.7; see 136 F.3d at 1467 (quoting regulation defining "hours worked" to include "[a]ll time spent by an employee performing an activity for the benefit of an agency and under the control or

direction of the agency" and describing the case as involving the scope of the § 4(a)(1) "exception to th[at] general rule").

Indeed, it is because the travel from home to work in *Reich* did not obviously entail – as required driving does – "physical or mental exertion * * * controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer," *Tennessee Coal*, 321 U.S. at 598, that the Second Circuit examined closely, but rejected, the Secretary's contention that paying attention to the canine during the commute was itself "work." See 45 F.3d at 651.

Thus, as *Singh* illustrates, the Second Circuit's consideration of "additional" burdens and restrictions does not reflect any view that these are *necessary* in cases (like this instant one) where the travel itself already involves employer-directed and -controlled labor, but rather that these, when onerous enough, may be *sufficient to* "transform [a] commute * * * into work," where exertion and employer control are absent. 524 F.3d at 367 (considering seriously claim by plaintiffs for time spent commuting by subway).

In cases like *Singh* (and *Reich*), where *only* commuting is involved, the Second Circuit held, that determination should be based on a "predominant benefit" test like the one that court applies "to claims for break time [compensation]," 524 F.3d at 368 (citing *Reich* v. *Southern New England Telecomm. Corp.*, 121 F.3d 58, 64-66 (2d Cir. 1997)), looking to "whether an employer's restrictions hinder the employees' ability to use their commuting time as they otherwise would have had there been no work-related restrictions." The court held that standard unmet in *Singh* because the requirement to carry work documents did not prevent

plaintiffs from using commuting time "as they otherwise would have * * * Whether it be reading, listening to music, eating, running errands, or whatever else [they] choose to do" 524 F.3d at 368; cf. *Avery* v. *Talladega*, 24 F.3d 1337, 1347 (11th Cir.1994) (noting, in break-time case, that plaintiffs could "return home, stop at the bank, pick up their dry cleaning, or run other personal errands").

Petitioners are not remotely "free to use their commuting time as they otherwise would have." Stops at dry cleaners aside, petitioners are unable to drop off or pick up school-age children during the work week or to schedule pre- or post-shift medical appointments in ways incompatible with their obligation to get their work vehicles and equipment directly home. Indeed, exertion aside, the employer's requirement that they *drive* a vehicle itself restricts activities petitioners "otherwise could" pursue while getting to and from work, including "reading, * * * eating," resting, conversing with friends or family, speaking on the telephone, or studying.

And as with the other courts' standards, see *supra*, the breadth of the divide between the governing rules of law in the Second and Federal Circuits is best seen by comparing the circumstances the Federal Circuit has held not to create "even a triable claim" with those in *Singh*, in which the Second Circuit described the required carrying of a briefcase on the subway as "pushing the limits on the burdens [an employer] may impose on its employees during a commute before it must pay them for such time," 524 F.3d at 369.

## III. The Federal Circuit's Construction Conflicts With The Secretary of Labor's

Although the decision below made some effort to acquit *Bobo*'s interpretation of inconsistency with the Secretary of Labor's, the Department's longstanding regulations (and its interpretations of those regulations) also condemn the Federal Circuit rule.

First, the Department's Portal Act regulations stand squarely against the Federal Circuit's two-tier interpretation of § 4(a), declaring that "[t]he term 'principal activities' includes *all* activities which are an integral part of a principal activity," 29 C.F.R. § 790.8(b) (emphasis added), and also announce an interpretive rule at odds with the Federal Circuit's: that "the words 'principal activities' [are] to be construed liberally * * * to include any work of consequence performed for an employer," *id.* § 790.8(a).

Although the Federal Circuit treated regulations indicating that "[o]rdinary home to work travel * * * is a normal incident of employment" and "not compensable," 29 C.F.R. § 785.35; *id.* § 553.221(e), as aces of trump, their very wording indicates that not *all* "home to work travel" is excluded. And being required, to *drive* a work vehicle, haul equipment between work and home, and prohibited from stopping are not usual "incidents" of employment. And as explained above, that an activity is "normally" not subject to compensation is a reason for *conducting* the *Steiner* analysis, not for *pretermitting* it.

Both the Portal Act rules and the "hours worked" regulations state plainly that travel that "is not segregable from the simultaneous performance of * * * assigned work," 29 C.F.R. § 790.7; *id.* § 785.38, is not subject to exclusion under § 4(a)(1) and that:

> work which an employee is required to perform while traveling must * * * be counted as hours worked. An employee *who drives a truck, bus, automobile*, boat or airplane, or an employee who is required to ride therein as an assistant or helper, *is working while riding*.

*Id.* § 785.41 (emphasis added). Indeed, none of the "[e]xamples of walking, riding, or traveling which * * * would normally be considered 'preliminary' or 'postliminary'" in 29 C.F.R. § 790.7(f) involves an employee's driving an employer vehicle, let alone being required to do so. Finally, that the employers' vehicles and equipment are required to be at petitioners' homes, to enable them to fulfill *work responsibilities* there – *i.e.*, emergency response, with equipment – implicates the Department's rule that "carry[ing] * * * equipment" while traveling, when the employee is "assigned" to do so, is "work," not excludable § 4(a)(1) "travel." See *id.* § 790.7(d).

The Federal Circuit rule's incompatibility with the Portal Act regulations is especially damning; not only were those issued nearly contemporaneously with the Act, see 12 Fed. Reg. 7655 (Nov. 18, 1947), but they were cited and relied upon in *Steiner*, see 350 U.S. at 255 & nn. 8 & 9, which both held the statutory language ambiguous, *id.* at 254, cf. *Brand X*, 545 U.S. at 982, and concluded that Congress had affirmatively endorsed the administrative interpretation in later legislation, 350 U.S. at 254-255 & n.8 (discussing 63 Stat. 920 (1949) § 16(c)). See also *Barnhart* v. *Walton*, 535 U.S. 212, 221-22 (2002).

At the Government's prompting, the Federal Circuit surveyed the regulatory landscape with a jaundiced eye, noting for example, that the Department's rule

distinguishing between an employee "permit[ted] to drive an ambulance to and from his home for the employee's own convenience" – who is not owed compensation – and one "required to take the ambulance home in order to respond to calls immediately, Wage and Hour Div., F.O.H. § 31d00(a)(5) (citation omitted), might be limited to that particular type of vehicle.

But such selective rebuttals miss three larger points. First, as petitioners emphasized below, the principle that driving is work and distinctions between an employer's providing transportation and its requiring or directing an employee to drive a vehicle to a job location are not particular to any one interpretation. They are mainstays of the Labor Department's construction of the Act.

Second, the Government-wide rule in place for decades provided that all time federal employees spent driving a government vehicle between work and home (without any limitation as to vehicle type) *is* compensable under the FLSA when pursuant to "a requirement of the employing agency[] to respond to emergency calls immediately from home," and that rule was expressly reaffirmed after notice-and-comment rulemaking, with the agency describing it as "consistent with practice in the private sector."

At least equally important, however plausible the Government's (and Federal Circuit's) contrary reading of regulatory text, the Secretary of Labor has repeatedly taken the position that § 4(a)(1) and the Department's regulations *do not* allow employers to require employees to drive vehicles (including to and from home) without paying them. See *Coke*, 551 U.S. at 178. As noted above, *Reich*, *Flint Engineering*, and

numerous other cases applying the "integral and indispensable" standard under § 4(a)(1)) were enforcement actions brought by the Secretary of Labor. In those cases, the Secretary interpreted the Department's regulations to require compensation for required driving, including home-to-work driving, in the face of employer arguments that these activities were "riding [and] travel" under the exclusion.

Finally, the stark conflict between the Government's interpretation of the FLSA in its capacity as defendant employer and in its role as enforcer is not merely unseemly. As the decision below recognized, Congress intended that, to the extent consistent with peculiarities of the federal workplace, federal employees would have the same FLSA rights as their private sector counterparts. See *AFGE* v. *OPM*, 821 F.2d 761, 770-771 (D.C. Cir. 1987); H.R. Rep. 93-913, 93rd Cong., 2d Sess. 28 (1974).[7]

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[7]Although the decision below recognized that Congress significantly limited OPM's power to adopt a less-protective interpretation than the Labor Department's, the court's readiness to treat as "authoritative," App. 12a, a delphic statement appearing in an undated and unsigned website document, would be strange in any event. That statement, which recognizes that "commuting time" *is* work "to the extent * * * the employee is required to perform substantial work under the control and direction of the employing agency," but also cites *Bobo* for the proposition that an employee's "driving a Government vehicle * * * is not a basis for determining that commuting time is hours of work," is hardly definitive. And it includes no acknowledgment of OPM's longstanding, formally-adopted view that home-to-work driving by emergency responders was compensable; nor mention the Labor Department's rules – or OPM's duty to align its interpretation of the FLSA with the Secretary's.

## IV. The Federal Circuit Rule Rests On Further Significant Errors

Although inconsistency with *Steiner* and *Alvarez* and the premise that "mere" employer-required driving cannot be "cognizable work," are its defining errors, the Federal Circuit rule breaks with controlling law in two other significant respects.

First, the *Bobo* court, after narrowing its inquiry to restrictions and burdens beyond the work of driving itself, invoked the "*de minimis*" rule announced in *Anderson* – that the FLSA, like the law generally, does not concern itself with "trifles," to conclude, as a matter of law, that none of the employer-imposed burdens and requirements sufficed to entitle plaintiffs to compensation.

And in the decision below, the Federal Circuit (echoing *Adams*) held that "the general rule" that the employers bear the burden of establishing FLSA exemptions, *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 196-199 (1974) – and its corollary that "exemptions are to be narrowly construed against the employers seeking to assert them," *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) – were inapposite because these principles apply only to "exemptions," not to "exclusions," such as the Portal Act.

In both respects, the Federal Circuit erred.

### A. The Federal Circuit Rule Improperly Expands The Narrow Authority Recognized in *Anderson*

The version of the *de minimis* rule applied below is fundamentally at odds with *Anderson* (and with the Department of Labor's and other federal courts' understanding of the doctrine). As these authorities make plain, the rule's proper domain is narrow – permitting courts to decide that the *quantity of time* an

activity consumes is so small that it may be disregarded; see 328 U.S. at 692 (rule weeds out "split-second absurdities"); see *Lindow* v. *United States*, 738 F.2d 1057, 1062 (9th Cir.1984). It supplies no authority – or standard – for determining the legal significance of employer restrictions, such as the prohibition on making stops and carrying passengers, See, *e.g.*, *Knowles* v. *Unted States*, 29 Fed. Cl. 393, 395 n.3 (Ct. Fed. Cl. 1993) ("whether the *amount* of time spent is so short as to not require compensation" is a different question from "whether the character of the activity is work") (emphasis original); *Dole* v. *Enduro Plumbing, Inc.*, 1990 WL 252270, *6 (C.D. Cal. 1990) ("the *de minimis* doctrine * * * become[s] an issue only after it is first determined that the time is compensable in character").

And even if the "*de minimis*" rule could be transplanted to make these very different kind of determinations, the Federal Circuit version would still be untrue to *Anderson*, because it considers burdens and restrictions separately, rather than cumulatively. See *Dunlop*, 527 F.2d at 401 (issue is whether "activities *combined* [involve] so slight an expenditure of the employees' time as to be *de minimis*"). As the Labor Department explained in its amicus brief in *Alvarez*, an "activity-by-activity approach" to the *de minimis* rule can "thwart[] the purposes of the FLSA," because "almost any activity can be broken down into constituent parts that could be conceptualized as individual [noncompensable] activities." U.S. Amicus Br. No. 04-66 at 26-27.

That danger is dramatically illustrated here. Not only does did *Bobo*'s "*de minimis*" analysis consider restrictions and burdens separately, but it inexplicably

omitted from the calculus altogether the multiple, significant burdens and restrictions inherent in requiring employees to *drive* special work vehicles and equipment between work and home, rather than take public transportation, ride as passengers with spouses or neighbors, or drive their own cars.

The net effect of the court's revision of *Anderson* is striking: no working person, previously free to get to and from work as he pleased, who was abruptly required by his employer to drive the employer's vehicle and transport work equipment every day, placed on-duty during the drive, and forbidden from carrying passengers or making any personal stops, would possibly regard the imposition as a "trifle[]," 328 U.S. at 692.

B. The Distinction Between "Exceptions" And "Exemptions" Is Groundless

The Federal Circuit's sharp distinction between the rules for construing and deciding "exceptions" and "exemptions" makes scant sense either. Although the decision below is not alone in making such bright-line pronouncements, see *Anderson* v. *Cagle's, Inc.*, 488 F.3d 945, 957 (11th Cir. 2007) (rejecting the relevance of these rules in interpreting § 203(o), reasoning that "[h]ad Congress sought to bestow upon [that provision] the same status as the exemptions set forth in § 213, it easily could have amended § 213 instead of § 203"), the Ninth Circuit decision in *Alvarez* took the very position the Eleventh Circuit rejected see 339 F.3d 894, 905 (9th Cir. 2003), and as other courts have recognized, the policies animating the rules of narrow construction of "exemptions" would seem entirely applicable in the case of "exceptions." Indeed, it is unclear what refusing to construe "exceptions" narrowly would

accomplish if a court adheres to the directive to broadly construe the general rule. See *Dunlop*, 527 F.2d at 398 (Portal Act must be construed liberally "to encompass 'any work of consequence'"); 29 C.F.R. § 790.8(a) (same).

Indeed, contrary to the assumption below, courts frequently place the burden on employers in cases where the ultimate question is in some sense whether an employee has performed "compensable work." See *Roy* v. *County of Lexington*, 141 F.3d 533, 544 (4th Cir.1998) (break time under 29 C.F.R. § 785.19); *Bernard* v. *IBP, Inc.*, 154 F.3d 259, 265 (5th Cir.1998) (same); but see *Hertz* v. *Woodbury County*, 566 F.3d 775, 783 (8th Cir. 2009).

In any event, the authority the Federal Circuit cited, *Anderson*'s observation that "the employee who brings suit * * * has the burden of proving that he performed work for which [he was unpaid]," 328 U.S. at 686-87, provides scant support. That statement appears in the course *rejecting* the lower court's rule that workers should bear the risk of nonpersuasion – and announcing what was effectively a re-allocation of the burden of proof: *i.e.*, *employers* could be liable for reasonable amounts claimed unless they adduced evidence that the employee had performed less (or no) "compensable work." See *id.* at 687-88.

Even if there were some reason to pare back on courts' resort to *ad hoc* burden-shifting rules, however, the Portal Act would be an unlikely target. It is a separate provision of law that operates to relieve employers of an obligation to pay compensation for activities that otherwise satisfy the definition of "work." See *Bobo*, 136 F.3d at 1467.

## V. The Important Issues Raised By The Federal Circuit's Rule Warrant Review By This Court

This Court's review is needed to bring the Federal Circuit's construction of a significant federal statute in line with this Court's own and to vindicate core congressional judgments expressed in the FLSA: that "all actual work" should be compensated and that federal employees receive the same protection as private sector counterparts.

The principal question presented involves a central, building block concept, "compensable work," in a nationally important law, in a setting in which all three branches of government have recognized predictability and uniformity to be of surpassing importance. As noted above, the Federal Circuit's errors concerning the allocation of proof and the *de minimis* exception are not limited to the Portal Act, and that court's interpretation of § 4(a)(1) has already gained a toehold in other jurisdictions (which have followed *Bobo* in misunderstanding the Second Circuit's very different law).

But even if the problematic construction were confined to the Federal Circuit, that court's interpretation of the FLSA effectively controls the rights of large numbers of federal workers, including many thousands who have currently pending claims that risk being decided under the multiply-flawed *Bobo* rule. See *Adams* v. *United States*, 2009 WL 4785159 (Ct. Fed. Cl. Dec. 9, 2009). And as the proceedings in this case attest, that court has shown no interest in reconsidering its rule or inclination to bring the federal sector interpretation of the FLSA into conformity with the Labor Department's. Under these

circumstances, this Court's intervention is appropriate and necessary.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals,
Federal Circuit.
Terry J. EASTER and Michael Eggleston, Plaintiffs,
and
Steven A. Hudson, Michael S. Morgan, Vanessa R. Spencer, and John A. Winslow, Plaintiffs-Appellants,
v.
UNITED STATES, Defendant-Appellee.
**No. 2008-5187.**

Aug. 5, 2009.

Before MAYER, and BRYSON, Circuit Judges, and SPENCER, Chief District Judge.

BRYSON, Circuit Judge.

The dispute in this case is identical in all material respects to the dispute that was before this court less than three years ago in Adams v. United States, 471 F.3d 1321 (Fed. Cir. 2006), and is similar to the dispute that was previously before this court in *Bobo v. United States,* 136 F.3d 1465 (Fed. Cir. 1998). The task in this case is therefore mainly to determine whether there is any reason for us to distinguish or depart from the *Adams* and *Bobo* decisions. We conclude that there is not, and we therefore affirm the decision of the Court of Federal Claims granting summary judgment in favor of the government.

We have little to add to the thorough opinion of the Court of Federal Claims. Nonetheless, at the risk of redundancy, we set forth our reasoning in this case because there are a large number of similar cases

pending before the Court of Federal Claims, and our resolution of various issues raised by the appellants in this case may facilitate the disposition of those other cases.

I

The four appellants are federal employees who are required, as a condition of their employment, to use government vehicles when driving between their homes and their places of work as part of their daily commutes. They are not allowed to use the vehicles for personal purposes, including running personal errands on their way to or from work. In light of the requirements that (1) they use government vehicles for commuting, (2) they refrain from using the vehicles for personal purposes, and (3) they transport work-related equipment with them when they use the vehicles for commuting, the appellants argue that their commuting time constitutes a compensable period of work under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.*

II

The plaintiffs in the *Bobo* case were a group of Border Patrol dog handlers. They were required to have their dogs reside with them and were paid for conducting dog care tasks at home. The dog handlers were also required to use special government vehicles to commute between their homes and their workplaces. They were required to transport the dogs with them on that commute, and they were not allowed to engage in personal business during the commute. They were not paid for the commuting time.

The dog handlers filed suit in the Court of Federal Claims, arguing that their time spent commuting constituted compensable worktime, particularly in

light of the various restrictions and requirements that governed their commutes. The Court of Federal Claims and this court, however, both held that the commuting did not constitute work for purposes of the FLSA, notwithstanding the restrictions imposed by the agency. The court noted that regulations of the Office of Personnel Management spell out the general requirement of the FLSA that federal employees who are not exempt from the Act must be paid for the time they spend "performing an activity for the benefit of an agency and under the direction and control of the agency." 5 C.F.R. § 551.401(a). The court explained, however, that the general rule captured by that regulation is subject to the Portal-to-Portal Act, which amended the FLSA, and which provides that compensation need not be provided for time spent traveling to and from the employee's place of work or for activities "which are preliminary to or postliminary to" the employee's principal work activity. 29 U.S.C. § 254(a). Judicial constructions of that Act, the *Bobo* court explained, had led to the general rule that activities performed before or after the employee's regular shift are compensable "if those activities are an integral and indispensable part of the principal activities" of the employees' work. *Bobo,* 136 F.3d at 1467, quoting *Steiner v. Mitchell,* 350 U.S. 247, 256, 76 S.Ct. 330, 100 L.Ed. 267 (1956). The Bobo court then concluded that even though the restrictions placed upon the agents' commutes were mandatory, "the burdens alleged are insufficient to pass the *de minimis* threshold" and therefore are not compensable. 136 F.3d at 1468. The court specifically adverted to the agents' argument that the prohibition on making personal stops during their commutes made the agents' commutes compensable work time and rejected that

argument, holding that "such a restriction on their use of a government vehicle during their commuting time does not make this time compensable." *Id.*

In *Adams,* decided nine years later, the court followed the analysis in *Bobo* and reached the same result, this time with respect to a group of several thousand law enforcement officers who were issued government police vehicles. The officers were required to commute from home to work in their vehicles, they were required to keep their weapons and other law-enforcement-related equipment with them, and they were prohibited from using the vehicles for personal business. Following the analysis used in *Bobo,* the court concluded that the officers' commuting time, even though subject to certain restrictions, was not compensable under the FLSA, particularly in light of the provisions of the Portal-to-Portal Act. *Adams,* 471 F.3d at 1326-28.

III

The trial court held that the facts in this case are indistinguishable from the facts in *Bobo* and *Adams* and that the court was compelled by those precedents to reject the appellants' claims. In her opinion, the trial judge addressed each of the arguments raised by the appellants as to why *Bobo* and *Adams* did not dictate a similar result in this case, and she rejected them all. *Easter v. United States,* 83 Fed. Cl. 236 (2008). In particular, she declined to entertain the argument that those cases were simply wrongly decided and should not be followed, since the decisions of this court are binding precedent for the Court of Federal Claims. She also rejected the argument that *Bobo* and *Adams* are inconsistent with Supreme Court precedent and prior Federal Circuit precedent and should not be followed

for that reason as well. After the trial court entered summary judgment against them, the appellants took this appeal.

IV

At the outset, we address a procedural point raised by the appellants regarding the entry of summary judgment. The appellants filed their complaint in September 2004. The case was stayed pending the litigation in the *Adams* case, which the plaintiffs in this case represented was "likely to call for a determination of the same or substantially similar questions as are presented in this case." In March 2008, after the completion of the proceedings in *Adams,* the trial court lifted the stay and ordered the government to file any dispositive motions by April 4, 2008. The government then moved for dismissal under Rule 12(b) of the Rules of the Court of Federal Claims ("RCFC") for failure to state a claim on which relief can be granted. The appellants filed an opposition to that motion and attached to their opposition the declarations of two of the appellants. On August 1, 2008, after further briefing and oral argument, the court entered a dispositive order in which the court treated the government's motion to dismiss as a motion for summary judgment and then entered summary judgment in favor of the government.

Like the equivalent Federal Rule of Civil Procedure, RCFC 12(b) (the pertinent portion of which has recently been re-codified as RCFC 12(d)) allows a court to treat a motion to dismiss for failure to state a claim as a summary judgment motion if "matters outside the pleadings are presented to and not excluded by the court." Relying heavily on this court's decision in *Thoen v. United States,* 765 F.2d 1110 (Fed.

Cir. 1985), the appellants argue that under the circumstances of this case it was error for the trial court to convert the government's Rule 12 motion into a summary judgment motion.

Before the court may convert a motion for judgment on the pleadings into a motion for summary judgment, the court must ordinarily provide notice of its intention to do so. Several courts have held, however, that in a case such as this one, in which it is the non-moving party that introduces extra-pleading matter, that party is deemed to be on constructive notice that the court may convert the motion into a motion for summary judgment. *See Rubert-Torres v. Hospital San Pablo, Inc.,* 205 F.3d 472, 475 (1st Cir. 2000); *Gurary v. Winehouse,* 190 F.3d 37, 42-43 (2d Cir. 1999); *Hamm v. Rhone-Poulenc Rorer Pharms., Inc.,* 187 F.3d 941, 948-50 (8th Cir. 1999); *San Pedro Hotel Co. v. City of Los Angeles,* 159 F.3d 470, 477 (9th Cir. 1998). Although the Third Circuit has rejected that "constructive notice" approach, it has held that the conversion is nonetheless subject to harmless error analysis. *See In re Rockefeller Ctr. Props., Inc., Sec. Litig.,* 184 F.3d 280, 288-89 (3d Cir. 1999). In this case, we need not decide whether the appellants had constructive notice of the conversion, as we conclude that any error on the trial court's part with respect to the conversion was harmless.

Throughout this litigation, the issue at the core of the dispute has been treated as purely legal; there has been no serious contention that the facts are contested. The facts set forth in the affidavits submitted by the two appellants were not in any way challenged by the government, and those facts are identical in all material respects with the facts presented in the *Adams* litigation. Significantly, the appellants have not

suggested that they had additional facts that they were unable to present to the trial court because of the court's decision to convert the government's motion into a motion for summary judgment, and the government made no effort to introduce any factual presentation of its own. In sum, this case involves essentially undisputed facts and turns on the legal consequences that attach to those facts. Accordingly, nothing of significance turns on the distinction between a ruling on the pleadings and summary judgment.

The question whether a party has had a "reasonable opportunity" to present pertinent summary judgment materials when a trial court converts a motion to dismiss into a motion for summary judgment "necessarily turns on the way in which the particular case under consideration has unfolded." *Whiting v. Maiolini,* 921 F.2d 5, 6 (1st Cir. 1990). In addition to looking to whether notice, actual or constructive, has been given, courts have disfavored conversion when "the motion comes quickly after the complaint was filed [or] discovery is in its infancy and the nonmovant is limited in obtaining and submitting evidence to counter the motion." *Rubert-Torres,* 205 F.3d at 475. In this case, the trial court did not act precipitously in converting the motion to dismiss into a motion for summary judgment; the court's ruling came five months after the court lifted the stay of the proceedings in this case, and well after the government had responded to the appellants' discovery requests. In addition, the trial court engaged in a colloquy with the parties during oral argument on the motion to dismiss regarding whether the proceeding should be treated as a summary judgment proceeding in light of the appellants' submission of extra-pleading materials.

The court's action therefore could not have come as a surprise to the appellants.

Finally, nothing in *Thoen* alters this analysis. In *Thoen*, the government moved for dismissal on jurisdictional grounds, and the trial court converted the motion to a motion for summary judgment on the merits. 765 F.2d at 112-13. The change from jurisdiction to the merits meant that the court was addressing an issue entirely different from that presented in the government's motion. This court held that the government's submission of materials outside the pleadings in support of its jurisdictional motion did not put the plaintiff on constructive notice that the court would address the merits of the dispute. *Id.* at 114. In this case, it was the plaintiffs who introduced the extra-pleading material. Moreover, the motion to dismiss in this case was on the merits, so the government's motion presented issues that were entirely congruent with those decided by the court in entering summary judgment. For those reasons, the trial court's conversion of the government's motion was not contrary to the decision in *Thoen*. And because the trial court's action did not result in any discernible prejudice to the appellants, we are not required to reverse the judgment based on the assertedly improper conversion.

V

On the merits, we begin with the straightforward proposition that this court's prior decisions in *Bobo* and *Adams* are binding on this panel. In the absence of an en banc decision overruling those cases or some other intervening event-such as a statutory or regulatory change that would require us to revisit those decisions, or an intervening Supreme Court decision clearly

undermining *Bobo* and *Adams*-we are required to adhere to those precedents. Thus, to the extent that the appellants' argument is simply a challenge to the correctness of this court's decisions in *Bobo* and *Adams,* we reject it.

With respect to the appellants' argument that Supreme Court or other Federal Circuit decisions require us to overturn the decisions in *Bobo* and *Adams,* we disagree. To begin with, several of the decisions on which the appellants rely predate *Adams* and thus do not qualify as subsequent authority that would call *Adams* into question. In any event, even without regard to the issue of timing, we do not find in those authorities any persuasive ground for reconsidering *Bobo* and *Adams.*

A

In seeking to avoid the *stare decisis* effect of *Bobo* and *Adams,* the appellants invoke the Supreme Court's decisions in *National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005), and *Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 127 S.Ct. 2339, 168 L.Ed.2d 54 (2007). As the trial court explained, those cases are entirely inapposite, and neither provides any support at all for the appellants.

The two Supreme Court decisions involve specific applications of the general principle of judicial deference to administrative rulemaking generally referred to as the " *Chevron* doctrine." *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). In the *Long Island Care* case, the Court required judicial deference to a Department of Labor regulation that addressed the extent to which the FLSA applies to persons

employed to provide companionship services to individuals who are incapable of caring for themselves. The Court noted that Congress had expressly authorized the Labor Department to engage in "gap-filling" with respect to the scope and definition of the terms "domestic service employment" and "companionship services" in the FSLA. 551 U.S. at 165, 127 S.Ct. 2339. Because the Supreme Court concluded that the Department of Labor had not exceeded the congressional mandate, it directed the lower courts to defer to the agency's interpretations of those terms.

In the *Brand X* case, the Court again mandated judicial deference to an agency's interpretation of a statute. In that case, the reviewing court had previously interpreted the statute in one way, and the agency subsequently adopted a different interpretation through an authorized rulemaking process. When the reviewing court overturned the agency's regulatory interpretation based on its own prior decision, the Supreme Court reversed, holding that because the statutory language in question was ambiguous, the reviewing court had to defer to the agency's reasonable interpretation of that language, even though the reviewing court had previously interpreted the same language in a different manner before the agency had construed it. 545 U.S. at 983, 125 S.Ct. 2688. Thus, the Supreme Court concluded, the fact that the reviewing court had previously interpreted the statutory language did not deprive the agency of its congressionally mandated authority to interpret that language, nor did it free the reviewing court from its responsibility to exercise its reviewing responsibilities under the deferential mandate of *Chevron*.

Neither of those cases has any pertinence here. Unlike in *Brand X*, this is not a case in which a court

has construed an ambiguous statute in a particular way, after which an agency has issued regulations interpreting the statute differently than did the court. The pertinent OPM regulations have remained the same since 1980, and there have been no regulatory changes since *Bobo* and *Adams* that would suggest agency disagreement with those decisions. Unlike in *Long Island Care*, this court in *Bobo* and *Adams* did not reject an agency's regulatory interpretation of a statute that it administers. Although the appellants complain that the *Adams* court ignored the regulations, a more plausible explanation for the court's failure to advert to the regulations in *Adams* is that those regulations were not helpful to the plaintiffs in that case and thus deference to those regulations would not have altered the court's decision. As we discuss below, the applicable OPM regulations did not support the appellants' position in *Adams*, and they do not support the appellants' position here.

The appellants point to an OPM regulation, 5 C.F.R. § 551.422(a)(2), which provides that time spent traveling shall be considered hours of work if an employee "is required to drive a vehicle or perform other work while traveling." That regulation, however, leaves unclear the extent to which "traveling," as the term is used in that regulation, encompasses commuting between home and work. A related OPM regulation, 5 C.F.R. § 551.422(b), deals with that specific issue and makes clear that an employee "who travels from home before the regular workday begins and returns home at the end of the workday is engaged in normal 'home to work' travel; such travel is not hours of work." Those regulations do not support the appellants' position; if anything, they tend to support the government. Even more telling, however, is the

informal guidance provided by OPM as to the meaning of the latter regulation. In a website publication cited by both parties, OPM expanded upon the commuting regulation and wrote the following, citing the *Bobo* decision as authority:

> [C]ommuting time may be hours of work to the extent that the employee is required to perform substantial work under the control and direction of the employing agency-i.e., productive work of a significant nature that is an integral and indispensable part of the employee's principal activities. The fact that an employee is driving a Government vehicle in commuting to and from work is not a basis for determining that commuting time is hours of work.

Hours of Work for Travel, http:// www. opm. gov/ oca/ worksch/ html/ travel. asp. To the extent that the OPM regulations are ambiguous, the agency's guidance is an authoritative interpretation that warrants deference. *See Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997).

In sum, because the agency regulations do not support the appellants' position in this case, neither *Brand X* nor *Long Island Care* provides any reason to question the decisions in *Bobo* and *Adams* or any reason to depart from those decisions here. The Supreme Court cases are simply dry holes for the appellants.

B

The appellants next cite the decision of this court in *Billings v. United States,* 322 F.3d 1328 (Fed. Cir. 2003), in support of the proposition that Congress intended for OPM, to the extent practicable, to make its guidelines for the application of the FLSA in the

federal sector generally consistent with corresponding Department of Labor regulations applicable to the private sector. Even assuming that we could overrule our prior decision in *Adams* based on its asserted failure to follow Department of Labor regulations, we would not do so, because the premise of the appellants' argument is incorrect: There is no conflict between the OPM regulations and the parallel regulations of the Department of Labor.

The applicable Labor Department regulations are generally similar to OPM's, and do not directly conflict with respect to the subject matter of this case. Section 553.221(e) of the Labor Department regulations, 29 C.F.R. § 553.221(e), establishes the baseline principle that "[n]ormal home to work travel is not compensable, even where the employee is expected to report to work at a location away from the location of the employer's premises." *See also id.* § 785.35. That regulation is followed by one that states:

> A police officer, who has completed his or her tour of duty and who is given a patrol car to drive home and use on personal business, is not working during the travel time even where the radio must be left on so that the officer can respond to emergency calls. Of course, the time spent in responding to such calls is compensable.

*Id.* § 553.221(f).

The appellants argue that the "police officer" regulation supports them because it provides that a police officer "who is given a patrol car to drive home *and use on personal business* " is not working. Extrapolating from that language, they take the regulation to mean that if the officer is *not* free to use the police vehicle on personal business, he must be

working. That conclusion, however, does not follow. The fact that the regulation describes a set of facts and states that a case fitting that fact pattern would not require compensation does not mean that if any of the facts were changed, compensation would be required.

The other references from the Department of Labor on which the appellants rely are also unavailing. The appellants cite a 1986 excerpt from the Field Operations Handbook of the Department's Wage and Hour Division that deals with "special problems"; that excerpt states that if an employee is required to drive an ambulance home in order to be able to respond to calls immediately, the time spent in driving would constitute hours worked. Department of Labor, Wage and Hour Division, *Field Operations Handbook* § 31 d00(a)(5) (May 30, 1986). They also cite a 1995 opinion letter, WH-543, 1995 WL 17851862, which states that commuting time is not compensable if, among other circumstances, the choice to drive the employer's vehicle is a voluntary one on the part of the employee. Neither reference is directly supportive of the appellants' position in this case. The Field Office Handbook's discussion of the case of an ambulance driver deals with what the Handbook explicitly refers to as a "special problem," and for that reason cannot simply be extrapolated to all public servants who are required to use their official vehicles for commuting. The 1995 opinion letter, like the police officer regulation, describes a circumstance in which compensation is not required but does not expressly state that compensation would be required if any of the listed factors was altered.

Reliance on the 1995 opinion letter is further undercut by congressional action in response to that letter. Reacting to concerns over the 1995 opinion

letter and a predecessor opinion letter from 1994, Congress in 1996 enacted an amendment to the Portal-to-Portal Act known as the Employee Commuting Flexibility Act, Pub.L. No. 104-188, §§ 2101-03, 110 Stat. 1755, 1928 (1996), codified at 29 U.S.C. § 254(a)(2). That Act provided that an employee's use of an employer's vehicle for commuting and "activities performed by an employee which are incidental to the use of such vehicle for commuting" is not compensable work if the use of the vehicle is within the normal commuting area for the employer's business and the use of the employer's vehicle is subject to an agreement between the employer and the employee or an employee representative.

The trial court did not rely on the Employee Commuting Flexibility Act as a basis for its decision in this case because, as the government concedes, the use of government vehicles at issue in this case was not subject to an employer-employee agreement.[1]

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[1]The appellants complain that the court in *Adams* improperly relied on the 1996 Act. While the *Adams* court cited the language that was added to the Portal-to-Portal Act in that year, the court did so only to make the general point that "merely commuting in a government-owned vehicle is insufficient; the plaintiffs must perform additional legally cognizable work while driving to their workplace in order to compel compensation for the time spent driving." 471 F.3d at 1325. On the merits, the court ruled against the Adams plaintiffs based on *Bobo* and on the court's conclusion that "the labor beyond the mere act of driving the vehicle is *de minimis*." *Id.* at 1328.

The appellants also argue that the court in *Adams* incorrectly held that the plaintiffs had the burden of proof with respect to the issue of FLSA compensability. The question of liability in *Adams*, however, turned not on the existence of an exemption from the FLSA, but on whether the driving at issue constituted compensable work under the statute. As the court correctly held

Nonetheless, the legislative history of that Act makes clear that Congress was not satisfied that the 1994 and 1995 opinion letters struck the proper balance between uncompensated commuting and compensable work. *See* H.R.Rep. No. 104-585, at 3 (1996). In light of the 1996 legislation, the continuing force of the 1995 opinion letter is therefore open to question. For these reasons, we conclude that there are no regulations or rulings of either OPM or the Department of Labor that dictate a different result from that reached by this court in *Bobo* and *Adams*. In fact, as noted, to the extent that there is any informal guidance from either agency as to the proper resolution of this dispute, it is found in the discussion on the OPM website, which endorses the approach followed by this court in *Bobo*.

C

In their brief, the appellants state in passing that this case differs from *Adams* in that "the claim that they were engaged in compensable Employer required driving from home to their work sites and from their last work site to their homes was not litigated at all in *Adams*" because in *Adams* "it was not claimed that the plaintiffs' compensable driving was from home to a 'first stop,' and from a 'last stop' to home." The distinction suggested by that passage is apparently based on the statements in the appellants' declarations in which they assert that their commuting activity often involves driving between home and a location where they are directed on particular occasions, other

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in *Adams*, the plaintiffs had the burden of proof on that issue. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946) ("employee who brings suit for unpaid wages ... has the burden of proving that he performed work for which he was not properly compensated").

than a fixed office or regular worksite.

The appellants do not adequately explain why the difference between their situation and that of the appellants in the *Bobo* and *Adams* cases requires a different outcome; that is, it is unclear why an employee's travel between home and a fixed workplace should be uncompensated, while the same employee's travel between home and varying work locations within the commuting area should be compensated. Indeed, both the OPM and Department of Labor regulations make clear that if commuting does not otherwise constitute work, the fact that the employee may be commuting to different job sites, rather than a fixed work location, does not make a difference. *See* 29 C.F.R. § 785.35 ("[O]rdinary home to work travel ... is a normal incident of employment. This is true whether he works at a fixed location or at different job sites."); *id.* § 553.221(e) ("Normal home to work travel is not compensable, even where the employee is expected to report to work at a location away from the location of the employer's premises."); 5 C.F.R. § 551.422(b), (d) (commuting to "temporary duty location" is not compensable if the temporary duty station is within "the limits of the employee's official duty station," i.e., within a prescribed mileage radius of up to 50 miles from the official duty station). In light of the absence of any persuasive argument justifying the distinction alluded to by the appellants, we decline to base a decision in the appellants' favor on those allegations. *AFFIRMED.*

United States Court of Federal Claims.
Terry EASTER, et al., Plaintiffs,
v.
The UNITED STATES, Defendant.
**No. 04-1435 C.**

Aug. 1, 2008.

*ORDER*

EMILY C. HEWITT, Judge.

I. Background

Plaintiffs in this action are employees of the United States of America (United States or government or defendant), employed by the Bureau of Alcohol, Tobacco, and Firearms (BATF), Bureau of Immigration and Customs Enforcement (ICE), and United States Secret Service (USSS). Complaint (Compl.) 1. On September 10, 2004, plaintiffs filed their Complaint in this court, "seek[ing] to recover from defendant back pay, liquidated damages, interest, attorney's fees and costs pursuant to the Fair Labor Standards Act of 1938 [ (FLSA) ], as amended, 29 U.S.C. [§§ 201-219]." *Id.* at 1-2. Plaintiffs' primary allegation is that from 2001 until the date of the filing, defendant had inappropriately labeled them as exempt employees under the FLSA and thereby withheld from them "pay and benefits due ... under the FLSA." *Id.* at 3. Plaintiffs requested that defendant be ordered "to conduct a full, complete and accurate accounting of all

back overtime, premium and other pay, leave, holiday and excused and other paid absence compensation, and benefits, interest and liquidated damages ... to plaintiffs ... from 2001...." *Id.* at 6.

In the parties' Joint Preliminary Status Report (J. Prelim. Status Rep.), filed on December 23, 2004, plaintiffs and defendant stated that:

> The parties believe there is a reasonable likelihood of settlement on the issue of whether plaintiffs are exempt from the FLSA as well as a likelihood that the amount of damages due each plaintiff can be resolved. However, it is unlikely that parties will resolve through settlement *whether plaintiffs are entitled to be compensated for driving a Government owned vehicle from home to work and work to home.*

J. Prelim. Status Rep. 3 (emphasis added). On May 23, 2005, the parties filed a Stipulation of Partial Dismissal (Stipulation), which dismissed the suit "in accordance with ... the terms of the Partial Settlement Agreement signed on behalf of the parties on May 20, 2005...." Stipulation 1. The Stipulation did not dismiss "plaintiffs' FLSA claims arising *from time solely spent driving a Government vehicle between home and work* [ (plaintiffs' driving claims) ], which remain[ed] the subject of further litigation...." *Id.* (emphasis added).

On the same date that they filed their Complaint, September 10, 2004, see Compl. 1, plaintiffs also filed with the court a Notice of Related Cases (Not. of Related Cases), stating that this case is "directly related to [*Adams v. United States (Adams I)*, 65 Fed. Cl. 217 (2005)] ... which [was] currently pending in the United States Court of Federal Claims, *the outcome of which is likely to call for a determination of the same or*

*substantially similar questions as are presented in the instant case.*" Not. of Related Cases 1 (emphasis added). In *Adams I,* several thousand government employees brought "overtime pay claims for time spent driving to and from work in government-issued vehicles." *Adams I,* 65 Fed. Cl. at 219. After the Court of Federal Claims determined that these driving claims were non-compensable under the FLSA, *id.* at 241, the *Adams I* plaintiffs appealed to the United States Court of Appeals for the Federal Circuit, *Adams v. United States (Adams II),* 471 F.3d 1321 (Fed. Cir. 2006). On March 1, 2006, this court stayed plaintiffs' driving claims "pending resolution in the Court of Appeals for the Federal Circuit of [*Adams II*]." Order of March 1, 2006 1. On December 18, 2006, the Federal Circuit upheld the Court of FederalClaims decision in *Adams I* and held that, according to precedent set in *Bobo v. United States,* 136 F.3d 1465 (Fed. Cir. 1998), "commuting done for the employer's benefit, under the employer's rules, is noncompensable if the labor beyond the mere act of driving the vehicle is *de minimis.*" *Adams II,* 471 F.3d at 1327-28. The Federal Circuit found that the *Adams II* plaintiffs' driving claims were *de minimis* and were therefore properly denied. *Id.* at 1328. The Federal Circuit's decision in *Bobo*, that an employee's driving of an employer's vehicle to and from work was not compensable under the FLSA, *Bobo,* 136 F.3d at 1468, was based on the Portal-to-Portal Act, 29 U.S.C. § 254(a) (2008), a Congressionally-enacted exception to the FLSA,[1] *see id.*

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[1]The Portal-to-Portal Act, 29 U.S.C. § 254(a), was amended by the Employee Flexibility in Commuting Act of 1996, *Adams v. United States (Adams I),* 65 Fed. Cl. 217, 224 (2005), now states, in relevant part:

at 1467. The *Adams II* plaintiffs' petition for rehearing *en banc* was denied, *Adams v. United States,* 219 Fed.Appx. 993, 993 (Fed. Cir. 2007), as was their petition for a writ of certiorari, *Adams v. United States,* ---U.S. ----, 128 S.Ct. 866, 169 L.Ed.2d 723 (2008).

On February 5, 2008, following the Supreme Court's denial of the *Adams II* plaintiffs' petition for writ of certiorari, this court ordered the parties to "file with the court a joint status report or, if the parties cannot agree, separate status reports addressing any reasons the stay should continue and describing proceedings needed to resolve the case." Order of February 5, 2008 1. In their Joint Status Report filed on February 26, 2008 (J. Status Rep.), the parties stated that they "anticipate[d] resolving the plaintiffs' [driving] claims ... through dispositive motions." J.

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> [N]o employer shall be subject to any liability or punishment under the [FLSA] ... [for] failure ... to pay an employee minimum wages, or to pay an employee overtime compensation, for ... (1) walking, riding, or *traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform,* and (2) activities which are preliminary to or postliminary to said principal activity or activities.... For purposes of this subsection, *the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment* and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.
>
> 29 U.S.C. § 254(a) (emphases added).

Status Rep. 1. The parties also stated that "Defendant believes ... that these claims are controlled by [*Adams II*] ..., and that, under this controlling precedent, plaintiffs' driving claims should be dismissed as a matter of law." *Id.*

On March 3, 2008, the court issued an order lifting its stay of the litigation of plaintiffs' driving claims and setting up a telephonic status conference for March 20, 2008. Order of March 3, 2008 1. Following this status conference, which was rescheduled for March 27, 2008 due to a scheduling conflict, Order of March 5, 2008, the court ordered defendant to file its dispositive motion(s), if any, on or before April 4, 2008, Order of March 28, 2008 ¶ 1. On April 3, 2008, defendant filed Defendant's Motion for Judgment on the Pleadings, Dismissing the Claims Remaining to be Adjudicated (Defendant's Motion or Def.'s Mot.), requesting that the court dismiss plaintiffs' driving claims pursuant to Rule 12(c) of the Rules of the United States Court of Federal Claims (RCFC). Def.'s Mot. 1. Defendant contends that plaintiffs' driving claims are controlled by the precedent of *Adams II* and are therefore non-compensable as a matter of law. *Id. passim.* On June 13, 2008, plaintiffs filed Plaintiffs' Opposition to Defendant's Motion for Judgment on the Pleadings, Dismissing the Claims Remaining to be Adjudicated (Plaintiffs' Opposition or Pls.' Opp.), arguing that "for several reasons, including recent decisions of the ... Supreme Court in *Long Island Care at Home, Ltd. v. Coke [(Coke)],* — U.S. —-, 127 S.Ct. 2339, 168 L.Ed.2d 54 (2007), ... and *National Cable & Telecommunications [Assoc.] v. Brand X Internet Services [(National Cable)],* 545 U.S. 967, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) ..., and distinguishing law and facts, defendant is not entitled to judgment on

the pleadings." Pls.' Opp. 1. Attached to Plaintiffs' Opposition were the Declaration of Steven A. Hudson (Hudson Declaration or Hudson Dec.) and the Declaration of Michael S. Morgan (Morgan Declaration or Morgan Dec.). Pls.' Opp. Ex. 1 and 2. On June 20, 2008, defendant filed Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion for Judgment on the Pleadings, Dismissing the Claims Remaining to be Adjudicated (Defendant's Reply or Def.'s Reply), in which defendant responded to Plaintiffs' Opposition and supported its initial request to dismiss plaintiffs' driving claims as noncompensable as a matter of law, based upon the controlling precedent of *Adams II*. Def.'s Reply *passim*. The court held oral argument on July 10, 2008, and, pursuant to the parties' presentations at oral argument, the court ordered additional briefing from the parties. *See* Order of July 10, 2008. On July 18, 2008, plaintiffs filed Plaintiffs' Memorandum Regarding *AARP v. EEOC* and Its Relevance to the Court's Determination of Defendant's Motion for Judgment on the Pleadings, Dismissing the Claims Remaining to be Adjudicated (Plaintiffs' Memorandum or Pls.' Memo.).[2] On July 25, 2008, defendant filed Defendant's Response to Plaintiffs' Memorandum Regarding *AARP v. EEOC* and Its Relevance to the Court's Determination of Defendant's

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[2] On July 31, 2008, plaintiffs filed Plaintiffs' Motion for Leave to File Supplemental Authority and Supplemental Authority (Plaintiffs' Supplement or Pls.' Supp.). In Plaintiffs' Supplement, plaintiffs argue that the Supreme Court's decision in *IBP, Inc. v. Alvarez (Alvarez)*, 546 U.S. 21, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005) is persuasive support for its claim that plaintiffs' driving time to and from work is compensable. The court is not persuaded by plaintiffs' argument regarding *Alvarez*, and the outcome of this Order is unaffected by Plaintiffs' Supplement.

Motion for Judgment on the Pleadings, Dismissing the Claims Remaining to be Adjudicated (Defendant's Memorandum or Def.'s Memo.).

II. Discussion

A. Standard for Rules of the United States Court of Federal Claims (RCFC) 12(c) Judgment on the Pleadings

RCFC 12(c) permits a party to seek judgment based on a complainant's pleadings. RCFC 12(c). The rule states:

> After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

*Id.* "A motion for judgment on the pleadings should be denied unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of his claim." *Branning v. United States,* 215 Ct.Cl. 949, 950, 1977 WL 9606 (1977) (citations omitted). "[R]egardless of whether the trial court is convinced that the plaintiff is unlikely to prevail at trial, the court should only grant a defendant's motion for judgment on the pleadings if the defendant is clearly entitled to judgment on the basis of the facts as the plaintiff has presented them." *Owen v. United States,* 851 F.2d 1404, 1407 (Fed. Cir. 1988). "[E]ach of the well-pled allegations in the complaint[ ] is assumed to be correct, and the court must indulge all

reasonable inferences in favor of the plaintiffs." *Atlas Corp. v. United States*, 895 F.2d 745, 749 (Fed. Cir. 1990). The court does not accept, however, "assertions in the pleadings that amount to legal conclusions." *J.M. Huber Corp. v. United States*, 27 Fed. Cl. 659, 661 (1993).

"Pursuant to RCFC 12(c), the trial court may convert a motion to dismiss into a motion for summary judgment under RCFC 56 if it relies on evidence outside the pleadings." *Brubaker Amusement Co. v. United States*, 304 F.3d 1349, 1355 (Fed. Cir. 2002); *see also* RCFC 12(c). "Conversion of a motion for judgment on the pleadings into one for summary judgment should only occur after the parties have been offered a 'reasonable opportunity' to present pertinent summary judgment materials." *Rubert-Torres ex rel. Cintron-Rubert v. Hospital San Pablo, Inc. (Rubert-Torres)*, 205 F.3d 472, 475 (1st Cir. 2000) (quoting Federal Rules of Civil Procedure (FRCP) 12(c)).[3] Conversion is typically disfavored when (1) the motion for judgment on the pleadings is filed shortly after the complaint; (2) the party not submitting evidence is limited in its ability to do so because of a lack of discovery; "or (3) the nonmovant does not have reasonable notice that a conversion might occur." *Id.* A party is on constructive notice that a conversion might occur when it has submitted evidence itself, thereby

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[3]The Rules of the United States Court of Federal Claims (RCFC) generally mirror the Federal Rules of Civil Procedure (FRCP). RCFC 12 Rules Committee Notes (discussing changes made to "more closely parallel FRCP 12"); RCFC 56 Rules Committee Notes ("The subdivision structure of RCFC 56 was reordered to more closely conform to FRCP 56."). Therefore, this court relies on cases interpreting FRCP 12 and FRCP 56, as well as those interpreting RCFC 12 and RCFC 56.

inviting conversion. *Id.*

Here, matters outside the pleadings have been presented to the court by plaintiffs in Plaintiffs' Opposition in the form of declarations by plaintiffs Steven A. Hudson and Michael S. Morgan. *See* Pls.' Opp. Ex. 1 and 2. None of the concerns articulated by the First Circuit in *Rubert-Torres* is present. *See Rubert-Torres,* 205 F.3d at 475. Defendant's Motion was filed on April 3, 2008, Def.'s Mot. 1, nearly three and half years after plaintiffs had filed their Complaint on September 10, 2004, Compl. 1. Further, the parties have already engaged in discovery. *See* Order of March 28, 2008 ¶ 2. Finally, plaintiffs, the nonmovants, themselves submitted evidence outside of the pleadings. *See* Pls.' Opp. Ex. 1 and 2. Accordingly, the court will treat defendant's Motion as a motion for summary judgment pursuant to RCFC 56. *See* RCFC 12(c); RCFC 56.

RCFC 56 provides that summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Jay v. Sec'y of Dep't of Health and Human Servs.,* 998 F.2d 979, 982 (Fed. Cir. 1993). A fact is material if it might significantly affect the outcome of the suit under governing law. *See Anderson,* 477 U.S. at 248, 106 S.Ct. 2505. Disputes over facts that are not outcome determinative will not preclude the entry of summary judgment. *Id.* Any doubts about factual issues are resolved in favor of the party opposing summary judgment, *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.,* 755 F.2d 158, 163 (Fed. Cir. 1985), to whom the benefits of all favorable inferences and presumptions

run, *see H.F. Allen Orchards v. United States,* 749 F.2d 1571, 1574 (Fed. Cir. 1984), *cert. denied,* 474 U.S. 818, 106 S.Ct. 64, 88 L.Ed.2d 52 (1985).

B. Controlling Precedent Exists for This Case

In Defendant's Motion, defendant argues that "according to binding precedent [ *Adams II* ] ..., plaintiffs are not entitled to compensation under the FLSA for time spent solely driving between home and work in a Government vehicle." Def.'s Mot. 5. Plaintiffs respond that *Adams II* is not controlling because the decision of the Federal Circuit was incorrect, is no longer valid, or is distinguishable from this case. Pls.' Opp. *passim.* For the following reasons, the court fails to find merit in any of plaintiffs' arguments, and therefore finds that *Adams II* is applicable to this case and binding upon this court.

The term "precedent" is defined by Black's Law Dictionary as "[a] decided case that furnishes a basis for determining later cases involving similar facts or issues." Black's Law Dict. 1214 (8th ed.2004). "Binding precedent" is defined as "a precedent that a court must follow." *Id.* at 1215. The precedent of the Supreme Court and the Federal Circuit is binding upon the United States Court of Federal Claims. *See Coltec Indus. v. United States,* 454 F.3d 1340, 1353 (Fed. Cir. 2006) ("There can be no question that the Court of Federal Claims is required to follow the precedent of the Supreme Court, our court [the United States Court of Appeals for the Federal Circuit], and our predecessor court, the Court of Claims." (citations omitted)). This binding precedent includes the manner in which the Supreme Court and the Federal Circuit interpret various Congressional and administrative statutes. *Passamaquoddy Tribe v. United States,* 82 Fed. Cl.

256, 261-62 (2008) ("The United States Court of Appeals for the Federal Circuit has ruled that this court must not engage in a *de novo* interpretation of statutes ...; rather, it should carefully follow the binding precedent in this circuit as to the meaning of ... relevant statutory terms." (citation omitted)). Accordingly, this court is bound to follow the statutory interpretations of the Supreme Court and the Federal Circuit, even if this court, on its own, would not interpret the statute in the same manner. *See Crowley v. United States,* 398 F.3d 1329, 1335 (Fed. Cir. 2005) (holding:

> [T]he Court of Federal Claims may not deviate from the precedent of the United States Court of Appeals for the Federal Circuit any more than the Federal Circuit can deviate from the precedent of the United States Supreme Court. Trial courts are not free to make the law anew simply because they disagree with the precedential and authoritative analysis of a reviewing appellate court).[4]

Therefore, unless the facts of this case are distinguishable from the facts in *Adams II,* or there

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[4]For example, in *Southern California Edison Co. v. United States (So.Cal.Edison),* 38 Fed. Cl. 54 (1997), the Court of Federal Claims held that it was not the proper forum to reexamine a jurisdictional issue relating to third party defendants that the Federal Circuit had already ruled upon. 38 Fed. Cl. at 62. That court stated:

> The third-party defendants urge the court to reexamine this issue. However, this is not the proper forum for that purpose. If the issue does warrant a second look, that is a reexamination only the court of appeals may undertake. So far as this court is concerned, it must accept the [Federal Circuit] decision as controlling precedent....

*Id.*

has been a change in the applicable law, the Federal Circuit's interpretation of the FLSA and the exception to it created by the Portal-to-Portal Act, as stated in *Bobo* and *Adams II,* control this case.

1. The Scope of the Contested Facts

As an initial matter, the court considers the scope of the issues remaining in the case after the parties filed their Stipulation of Partial Dismissal on May 23, 2005. That agreement provided that the parties had dismissed all claims other than "plaintiffs' FLSA claims arising from *time solely spent driving* a Government vehicle between home and work." Stipulation 1 (emphasis added). In the court's view, the plain meaning of that statement is that the plaintiffs had reserved claims arising only out of time spent driving, Stipulation 1 ("time solely spent driving"), rather than, for example, activities carried out before and/or after driving. Therefore, the court will review only the facts related to the time when the plaintiffs are in their government-issued vehicles, driving to and from work. All other claims, including claims that might arise out of activities alleged to have been carried out for the employer's benefit before driving or after driving, have been previously settled and are therefore not taken into account in this case. *See id.*

Employees' claims for compensation for time spent driving to and from work were the only claims at issue in the *Adams* litigation. *See Adams I,* 65 Fed. Cl. at 231 ("The *only type of claim* addressed in defendant's 2002 motion *is commuting time claims while driving a government vehicle to and from work* ...." (emphases added)); *id.* at 240 ("The *only type of claim* addressed in defendant's 2004 motion *is commuting time claims for 'time solely spent driving' a government vehicle to*

*and from work* ...." (emphases added) (citations omitted)). Because the only claims not settled prior to litigation, both here and in *Adams,* are those related to "time solely spent driving" a government vehicle to and from work, the court finds only the facts directly related to the plaintiffs' "commuting time" or "driving time" to be relevant to this decision.

2. The Facts of this Case are Indistinguishable From the Facts of *Adams II*

Plaintiffs argue that, based upon "distinguishing law and facts, defendant is not entitled to judgment on the pleadings." Pls.' Opp. 1. However, plaintiffs do not attempt to distinguish the facts in this case from the facts in *Adams II* or *Bobo* within their Opposition. *See* Pls.' Opp. *passim.* Instead, plaintiffs direct the attention of the court to the Hudson Declaration and the Morgan Declaration to discern for itself the factual differences. *See id.* at 1-2 ("[S]ee the declarations of plaintiffs Steven A. Hudson and Michael S. Morgan ..., which address, *inter alia,* the specific duties of their positions."). The Hudson Declaration states that Steven Hudson has been "employed as a Technical Enforcement Officer, GS-1801 ('TEO') by the United States Immigration and Customs Enforcement ('ICE') ... since 2004. Prior to that [he] was employed as a TEO by the United States Customs Service ('USCS') since at least 2001." Hudson Dec. 1. Hudson further declares that

> ICE and USCS have provided me with vehicles which I use for the purposes of performing my work as a TEO. My position requires that I drive my vehicle to many work locations and I have been required by ICE and USCS to transport the equipment that I use in performing my work in the

> rear compartment of my vehicle.... Because of the nature of my work, including being required to be available for service on behalf of ICE and USCS at all times, I have been required to transport my vehicle to my home each working day from whatever location I may be at when I conclude my operational duties.[5]

Hudson Dec. 2 (footnote added). Hudson also states that he is "prohibited from using [his] vehicle for personal purposes" and that "[w]hile driving [his] vehicle [he] is required to ... monitor [its] radio." *id.*[6]

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[5] Hudson goes on to state:

> Upon returning home I have been required by ICE and USCS to remove my government-issued firearms and ammunition from my vehicle and store them securely in my home. In the case of firearms, ICE and USCS have required that they be stored in a locked receptacle or safe overnight. The process of removing these items from my vehicle, carrying them into my home and storing them takes approximately 10 minutes each day. The process of removing them from storage and placing them in my vehicle at the commencement of each workday takes approximately 10 minutes each day.

Declaration of Steven A. Hudson (Hudson Declaration or Hudson Dec.) 2. However, these allegations are irrelevant in light of the fact that the parties' Stipulation of Partial Dismissal (Stipulation) stated that their Partial Settlement Agreement had settled all claims other than "claims arising from *time solely spent driving* a Government vehicle *between home and work.*" Stipulation 1 (emphasis added).

[6] The statements contained in the Hudson Declaration are the full extent of the facts presented to the court with respect to his driving claim. Nothing in the attached Technical Enforcement Officer (TEO) Position Description or in Plaintiffs' Opposition to Defendant's Motion for Judgment on the Pleadings, Dismissing the Claims Remaining to be Adjudicated (Plaintiffs' Opposition or Pls.' Opp.) elucidates what actually occurs during Hudson's commute, including what Hudson needs to do to monitor the

The Morgan Declaration states that Michael Morgan is "employed as an Explosives Enforcement Officer, GS-1801 ('EEO') by [BATF], and [has] been employed in that capacity at varying grade levels since at least 2001." Morgan Dec. 1. Morgan also declares that

> [BATF] provides me with a pickup truck ("truck") which I use for purposes of performing my work as an EEO. My position requires that I drive my truck to many work locations and I am required by the Bureau to transport the equipment that I use in performing my work in the rear compartment of my truck ... This equipment is stored in my truck and often exceeds 1000 pounds in weight. Because of the nature of my work, including being available for service on behalf of [BATF] at all times, I am required to transport my truck to my home from whatever location I may be at when I conclude my operational duties.

Morgan Dec. 2. Morgan goes on to state:

> Upon returning home I am required by [BATF] to remove my [BATF] issued firearm and computer from my truck and store them securely in my home. In the case of my firearm, [BATF] requires that it be stored in a pistol lock box. The process of

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vehicle's radio. *See* Hudson Dec. 5-12; Pls.' Opp. *passim*. However, because plaintiffs are opposing Defendant's Motion for Judgment on the Pleadings, Dismissing the Claims Remaining to be Adjudicated (Defendant's Motion or Def.'s Mot.), any doubts about factual issues are made in their favor, *see Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed. Cir. 1985), and the court will assume that Hudson is required to have the radio on at all times and be available to respond to any requests made of him by his employer.

> removing these items from my truck, carrying theminto my home and storing them takes approximately 5-10 minutes each day. The process of removing them from storage and placing them in my truck at the commencement of each workday takes approximately 5-10 minutes each day.

Morgan Dec. 2. However, these allegations are irrelevant in light of the fact that the parties Stipulation stated that their Partial Settlement Agreement had settled all claims other than "claims arising from *time solely spent driving* a Government vehicle *between home and work*." Stipulation 1. Like Hudson, Morgan is also "prohibited from using [his] truck for personal purposes. [It] may be used only in connection with, and in support of, [his] work for [BATF]." *Id.* Finally, "[w]hile driving [his] truck[,] [Morgan] remain[s] in phone contact with [BATF]." *Id.*[7]

Based upon the Hudson Declaration and the Morgan Declaration, it appears to the court that the facts in this case are that plaintiffs, as government employees, are required to drive government vehicles, containing government equipment, to and from work every day. Hudson Dec. 1-2; Morgan Dec. 1-2. While

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[7]The statements contained in the Morgan Declaration are the full extent of the facts presented to the court with respect to his driving claim. Nothing in the attached Explosives Enforcement Officer (EEO) Position Description or in Plaintiffs' Opposition elucidates what actually occurs during Morgan's commute, including what Morgan means when he says he is required to "remain in phone contact with [BATF]." *See* Morgan Dec. 2, 5-9; Pls.' Opp. *passim*. However, because plaintiffs are opposing Defendant's Motion, any doubts about factual issues are made in their favor, *Litton Indus. Prods., Inc.*, 755 F.2d at 163, and the court will assume that Morgan is in contact with BATF at all times during his commute.

driving their vehicles to and from work, plaintiffs are not permitted to make any personal stops, or use the vehicles for "personal purposes." Hudson Dec. 2; Morgan Dec. 2. In addition, Hudson is required to monitor his radio and Morgan is required to remain in phone contact with his employer at all times while driving to and from work. Hudson Dec. 2; Morgan Dec. 2.

In *Adams II,* the Federal Circuit described the factsof that case as follows:

> The plaintiffs are issued *government-owned police vehicles* and required as a condition of their employment *to commute from home to work in those vehicles.* This requirement facilitates their employers' law enforcement missions, since the cars will be available to the officers for rapid response to emergency calls at any time.... The officers' time is not entirely their own during their commutes: *they are required to have their weapons and other law enforcement-related equipment and to have on and monitor their vehicles' communication equipment. They are not allowed to run any personal errands in their government vehicles,* so their commute must proceed directly from home to work and back again without any unauthorized detours or stops.

*Adams II,* 471 F.3d at 1323 (emphases added). Like the plaintiffs in this case, the plaintiffs in *Adams II* were also required to transport equipment and to maintain contact with their employers and were prohibited from making any personal stops while commuting. *See id.* The court fails to see any factual differences between this case and *Adams II* such that *Adams II* would not be controlling precedent governing the outcome of

plaintiffs' driving claims.

3. Distinguishable Facts from Another Federal Circuit do not Trump Controlling Precedent

While plaintiffs do not attempt to distinguish *Adams II* or *Bobo* from this case, *see* Pls.' Opp. *passim*, they do attempt to distinguish this case from *Singh v. City of New York*, 524 F.3d 361 (2d Cir. 2008), a recent decision by the Court of Appeals for the Second Circuit, id. at 7-9. In *Singh*, the city of New York required its fire alarm inspectors (the inspectors) to carry necessary inspection files to and from work with them every day. *Singh*, 524 F.3d at 365. The documents were kept in a briefcase and weighed fifteen to twenty pounds. *Id.* The inspectors asserted that "carrying and keeping safe [those] inspection files affect[ed] their commutes in various ways and that they should therefore be compensated for their time and effort." *Id.* For example, two plaintiffs testified that "carrying documents caused them occasionally to miss a bus or train," *id.*, another plaintiff testified that "the briefcase slowed his commute by 'give or take' ten minutes," *id.*, and still other plaintiffs testified "that keeping the documents safe after work hours was inconvenient, preventing them from attending social events because they had to go directly home in order to ensure the safety of their documents," *id.*

The Second Circuit held that the inspectors did not need to be compensated pursuant to the FLSA for time spent commuting to and from work, even though they were required to carry and keep safe inspection documents during those times. *Id.* at 364. In reaching this decision, the Second Circuit examined (1) if the carrying of the briefcase constituted "work" under the FLSA, and (2) whether it was an "integral and

indispensable part of their inspecting duties." *Id.* at 367. The Second Circuit based its determination of whether the inspector's expenditure of time on their commute was work upon an analysis of "whether that time [was] spent predominantly for the benefit of the employer or the employee." *Id.* at 368. The Second Circuit found that "[w]hether it be reading, listening to music, eating, running errands, or whatever else the plaintiffs choose to do, their use of the commuting time is materially unaltered." *Id.* Therefore, "[w]hile the City certainly benefits from the plaintiffs' carrying these [inspection documents], it cannot be said that the City is the predominant beneficiary of [the commuting] time." *Id.* at 368-69. For this reason, the Second Circuit held that "under the circumstances presented in this case, the carrying of a briefcase during a commute without any other employment-related activity does not transform the entire commute into work for purposes of the FLSA." *Id.* at 370.

Plaintiffs submit that the Second Circuit's analysis that the inspectors reaped the predominant benefit of the commuting time in the circumstances of that case "distinguishes [this] case from *Singh,* and ... places the plaintiffs' driving in the category of FLSA compensable work." Pls.' Opp. 8. Plaintiffs contend that they "can demonstrate that their driving has been controlled and directed by defendant and has been engaged in *exclusively* for its benefit." *Id.* (emphasis added). Indeed, plaintiffs allege that their driving is controlled and directed by defendant, *see* Morgan Dec. 1-2; Hudson Dec. 1-2, however, identical findings were made in *Adams II* and *Bobo,* both holding plaintiffs' driving to be non-compensable work despite the fact that it was controlled and directed by their employers and done for their employer's benefit, *see Adams II,*

471 F.3d at 1328 ("*Bobo* still teaches that commuting done for the employer's benefit, under the employer's rules, is noncompensable if the labor beyond the mere act of driving the vehicle is *de minimis*. That is the case here."); *Bobo*, 136 F.3d at 1468 ("[W]e accept as true that the restrictions placed upon the INS Agents' commutes are compulsory, for the benefit of the INS, and closely related to the INS Agents' principal work activities.").

While the law of the Federal Circuit is binding upon this court, "decisions of other federal appellate courts, while 'afforded great weight,' are not binding on the ... Court of Federal Claims." *Taylor v. United States*, 73 Fed. Cl. 532, 541 n. 18 (2006) (quoting *Bankers Trust N.Y. Corp. v. United States*, 225 F.3d 1368, 1371 (Fed. Cir. 2000)). Therefore, even if the facts underlying the Second Circuit's decision in *Singh* are distinguishable from this case, that circumstance does not govern the disposition of plaintiffs' driving claims in this case. Because plaintiffs' driving claims are substantially factually identical to the claims in *Adams* and *Bobo*, they are controlled by Federal Circuit precedent.

4. There Has Been No Change in the Applicable Law Since the Federal Circuit's Decision in *Adams II*

Plaintiffs also argue that the Federal Circuit's decision in *Adams II* is not controlling in this case because "the reasoning in *Adams [II]* has been nullified by the Supreme Court's decisions in *Coke* and *National Cable*." Pls.' Opp. 2. It is plaintiffs' contention that these two Supreme Court decisions have altered the "law applicable to 'time worked' under the FLSA ... since *Adams[II]*," *id.*, thereby vitiating the precedential

value of *Adams II*. However, *National Cable* was decided prior to *Adams II* and neither case dealt with the question of whether time spent driving between home and work constitutes compensable hours under the FLSA. *See National Cable*, 545 U.S. *passim; Coke*, 127 S.Ct. *passim*.

a. The Supreme Court's Decision in *Coke* Did Not Change the Applicable Substantive Law for "Time Worked" Under the FLSA

The question of whether driving was compensable as "time worked" under the FLSA was not the question before the Court in *Coke*. The question before the Court in *Coke* was whether a Department of Labor (DOL) regulation governing an FLSA exemption for home health care workers was valid and binding "in light of [its] text and history, and a different (apparently conflicting) [DOL] regulation." *Coke*, 127 S.Ct. at 2344 (citing *Chevron, U.S.A., Inc. v. NRDC, Inc. (Chevron)*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). In *Coke*, the FLSA claimant, Evelyn Coke, was an employee of Long Island Care at Home, Ltd. (Long Island Care). *Id.* at 2345. Coke "provide[d] 'companionship services' to elderly and infirm men and women." *Id.* The case arose when Coke brought suit against Long Island Care seeking judgment for unpaid wages to which she believed herself entitled pursuant to the FLSA. *Id.* The issue in *Coke* was whether an FLSA exemption for "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves" applied to a home health care worker employed by a third party agency. *Id.* at 2344 (quoting 29 U.S.C. § 213(a)(15) (alterations in original)). The Department of Labor (DOL) regulation interpreting this exemption

stated that "exempt companionship workers include those 'who are employed by an employer or agency other than the family or household using their services ... [whether or not] such an employee [is assigned] to more than one household or family in the same workweek....' " *Id.* at 2345 (quoting 40 Fed.Reg. 7,407 (1975) (codified at 29 C.F.R. § 552.109(a) (2006)) (alterations in original)).

The United States Court of Appeals for the Second Circuit had held that DOL's regulation was "unenforceable" based upon "its content, its method of promulgation, and its context." *Id.* at 2346. Because it determined that the FLSA exemption may not apply to home health care workers such as Coke, the Second Circuit set aside the district court's initial dismissal of Coke's suit. *Id.* at 2344. The Supreme Court "vacated the Second Circuit's decision and remanded the case so that the Circuit could consider a recent DOL 'Advisory Memorandum' explaining (and defending) the regulation." *Id.* at 2345. However, the Second Circuit again held the regulation to be unenforceable, and the Supreme Court granted certiorari. *Id.*

After hearing arguments on the merits, the Supreme Court reversed, based upon an application of the standard for deference to agency interpretations of statutes articulated in *Chevron*. *See Coke,* 127 S.Ct. at 2345-46. The Court stated, "We have previously pointed out that the 'power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress,' " and that "[w]hen an agency fills such a 'gap' reasonably, and in accordance with other applicable (e.g. procedural) requirements,

the courts accept the result as legally binding." *Id.* at 2345-46 (quoting *Chevron*, 467 U.S. at 843-44, 104 S.Ct. 2778 (alteration in original) (citations omitted)). The Court found that Congress explicitly left gaps in its FLSA provisions, and it authorized the "Department of Labor ... to fill [those] gaps with rules and regulations." *Id.* at 2346 (citations omitted). Further, the Court found that the "subject matter of the regulation in question concerns a matter in respect to which the agency is expert, and it concerns an interstitial matter ..., the details of which ... Congress entrusted the agency to work out." *Id.* Finally, the Court found that DOL met all procedural requirements in promulgating the regulation because "[i]t gave notice, it proposed regulations, it received public comment, and it issued final regulations in light of that comment." *Id.*

Coke argued that, notwithstanding the facial adherence of the regulation to the *Chevron* standard, the regulation should be unenforceable because it "[fell] outside the scope of Congress' delegation; ... [was] inconsistent with another, legally governing regulation; ... [was] an 'interpretive' regulation not warranting judicial deference; and ... was improperly promulgated." *Id.* The Court rejected each of these arguments in turn and held that, because DOL's third party regulation was within the scope of the statute's delegation, was perfectly reasonable, and otherwise complied with the law, it was legally binding. *See Coke*, 127 S.Ct. at 2346-52.

dealt specifically with whether or not a certain DOL regulation (not involving commuting time) was valid and enforceable. The court does not perceive how the disposition of has any bearing upon the substantive law of whether or not driving a employer's

vehicle between home and work constitutes compensable work under the FLSA and the Portal-to-Portal Act. is simply not, as plaintiff suggests, a source of substantive change in the "law applicable to 'time worked' under [the] FLSA ... since *Adams [II].*" Pls.' Opp. 2.

b. Even if *Adams II* Did Not Give *Chevron* Deference to OPM Regulations, This Court Would Still Be Bound by its Precedent

*Coke* does not require this court to ignore *Adams II* because the Federal Circuit did not give the proper deference to agency regulations under the *Chevron* standard. *See* Pls.' Opp. 2-4 (concluding "[o]n this basis plaintiffs submit that just as was the case in *Coke,* this Court is obligated to defer to [Office of Personnel Management (OPM) ] regulations, and that on their face these regulations require it to declare plaintiffs' driving compensable under the FLSA.").[8]

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[8]The Office of Personnel Management (OPM) guidelines that plaintiffs believe should apply are §§ 551.401(a) and 551.422.(a)(2) of Title 5 of the Code of Federal Regulations regarding "Hours of Work." *See* Pls.' Opp. 4. Section 551.401(a) provides:

> All time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency is "hours of work." Such time includes: (1) Time during which an employee is required to be on duty; (2) Time during which an employee is suffered or permitted to work; and (3) Waiting time or idle time which is under the control of an agency and which is for the benefit of an agency.
>
> 5 C.F.R. § 551.401(a)(2008). Section 551.422(a), entitled "'Time spent traveling,' provides, "Time spent traveling shall be considered hours of work if: (1) An employee is required to travel during regular working hours; (2) An employee is required to drive a vehicle or perform other

First, plaintiffs have not proven that the *Adams II* court failed to take into account the relevant OPM regulations in adjudicating that case or that-if it had it-would have reached a different conclusion. In *Bobo*, the precedent upon which the *Adams II* court based its decision, the Federal Circuit cited to the very same OPM regulations which Plaintiffs' Opposition argues are controlling in this situation:

> The FLSA, *as interpreted by [OPM] regulations*, requires federal agencies to pay employees for "all time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency." 5 C.F.R. § 551.401(a) (1997). *However, the Portal-to-Portal Act, which amended the FLSA, creates an exception to this general rule* ....

*Bobo*, 136 F.3d at 1467 (emphases added). The Federal Circuit took note of the regulations but determined that they were not controlling in the context of compensation for time spent driving Government vehicles to and from work because of an exception expressed in the Portal-to-Portal Act. *Id.* at 1467-68. The Portal-to-Portal Act was amended by the Employee Flexibility in Commuting Act of 1996, *Adams I*, 65 Fed. Cl. at 224, and now states, in relevant part:

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work while traveling...." 5 C.F.R. §§ 551.422(a). However, plaintiffs do not cite to another, possibly applicable provision, section 551.422(b), which states, "An employee who travels from home before the regular workday begins and returns home at the end of the workday is engaged in normal 'home to work' travel; *such travel is not hours of work.*" 5 C.F.R. § 551.422(b) (emphasis added).

> [N]o employer shall be subject to any liability or punishment under the [FLSA] ... [for] failure ... to pay an employee minimum wages, or to pay an employee overtime compensation, for ... (1) walking, riding, or *traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform*, and (2) activities which are preliminary to or postliminary to said principal activity or activities.... For purposes of this subsection, *the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment* and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

29 U.S.C. § 254(a) (emphases added). Further, the Court of Federal Claims specifically discussed and rejected plaintiffs arguments relating to these OPM regulations in *Adams I*. *Adams I*, 65 Fed. Cl. at 239 ("Plaintiffs also allege that a variety of regulations ... support compensability of the commuting time claims here. Plaintiffs' citations to regulations include 5 C.F.R. §§ 551.401[and] 551.422.... However, [neither] of these regulations is directly on point for the commuting time claims alleged here."). Because OPM's regulations relied on by plaintiffs here were examined and rejected by the courts in both *Bobo* and *Adams I*, it is unlikely that the court in *Adams II* failed to give them the proper *Chevron* deference.

Furthermore, even if the Federal Circuit had failed

to give OPM regulations the proper *Chevron* deference in *Adams II*, its decision would still be binding upon this court. Plaintiffs argue that this court should abstain from following the precedent of the Federal Circuit, because, plaintiff alleges, the Federal Circuit was incorrect in its interpretation of the FLSA and Portal-to-Portal Act by not deferring to OPM regulations. Pls.' Opp. 2-4. But this contention is wrong. *Coltec*, 454 F.3d at 1353 ("There can be no question that the Court of Federal Claims is required to follow the precedent of the Supreme Court, [the Federal Circuit], and ... the Court of Claims."); *Crowley*, 398 F.3d at 1335 ("Trial courts are not free to make the law anew simply because they disagree with the precedential and authoritative analysis of a reviewing appellate court."); *Passamaquoddy Tribe*, 82 Fed. Cl. at 261-62 ("The United States Court of Appeals for the Federal Circuit has ruled that this court must not engage in a *de novo* interpretation of statutes ...; rather, it should carefully follow the binding precedent in this circuit as to the meaning of ... relevant statutory terms.").

c. *National Cable* is Distinguishable From This Case and Therefore Does Not Overrule the Controlling Precedent of *Adams II*

Plaintiffs also cite to *National Cable*, 545 U.S. at 967, 125 S.Ct. 2688, to support their assertion that *Adams II* is not binding upon this court in this case. Pls.' Opp. 1, 5-6. Plaintiffs deploy *National Cable* for the proposition that *stare decisis* does not trump an administrative agency's interpretation of an ambiguous rule. *See id.* at 5-6. *National Cable* involved a dispute regarding the classification of cable companies that sold broadband internet service pursuant to Title II of the Communications Act of 1934, as amended by the

Telecommunications Act of 1996 (Communications Act), 47 U.S.C. §§ 151-614. *National Cable,* 545 U.S. at 973-74, 125 S.Ct. 2688. The Federal Communications Commission (FCC) independently determined that these companies did not provide a "telecommunications service" as the Communications Act defines the term, *see* 47 U.S.C. § 153(46), and that they were therefore not subject to certain regulations applicable to providers of that service, *National Cable,* 545 U.S. at 977-78, 125 S.Ct. 2688. The Ninth Circuit Court of Appeals disagreed, holding that the FCC's conclusion was an impermissible construction of the term "telecommunications service" and therefore not legally binding. *Id.* at 979-980, 125 S.Ct. 2688. According to the Supreme Court, the Ninth Circuit "grounded its holding in the *stare decisis* effect of *AT & T Corp. v. Portland (Portland),* 216 F.3d 871 (9th Cir. 2000)," "[r]ather than analyzing the permissibility of that construction under the deferential framework of *Chevron.*" *Id.* at 979, 125 S.Ct. 2688. *Portland* had "held that cable modem service was a 'telecommunications service.' " *Id.* (quoting *Portland,* 216 F.3d at 877-880). The Supreme Court reversed the Ninth Circuit's decision, finding that the *Chevron* provided the appropriate analytical framework and that the Court of Appeals should have applied that framework rather than following the contrary construction it had applied in *Portland. Id.* at 982, 125 S.Ct. 2688 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from unambiguous terms of the statute and thus leaves no room for agency discretion.").

The *Portland* decision relied on by the Ninth

Circuit had been delivered in 2000, while the FCC's contrary regulation was not put into effect until March 2002. *See id.* at 977, 980, 125 S.Ct. 2688. Therefore, by rejecting the FCC's interpretation on the grounds of *stare decisis*, the Ninth Circuit was, in effect, barring the agency appointed by Congress to enforce legislation from interpreting that legislation in light of its expertise. The Court expressed concern that "[t]he Court of Appeals rule ... would 'lead to the ossification of large portions of our statutory law' ... by precluding agencies from revising unwise judicial constructions of ambiguous statutes." *Id.* at 983, 125 S.Ct. 2688 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 247, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001)). *National Cable* therefore held that the judicial construction of a statute does not bar subsequent interpretation by an administrative agency unless the judicial construction held that the statute was unambiguous. *See id.* If an administrative agency authorized by Congress to interpret and enforce legislation arrives at an interpretation of that legislation that is different from an earlier court interpretation, the court cannot automatically strike it down, but must instead analyze the agency's later interpretation under the *Chevron* framework. *See id.* at 983-85.[9]

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[9]The First Circuit case of *Dominion Energy Brayton Point, LLC v. Johnson (Dominion Energy)*, 443 F.3d 12 (1st Cir. 2006), helps to clarify this rule. In *Dominion Energy*, the First Circuit applied the rule from *National Cable & Telecommunications Association v. Brand X Internet Services (National Cable)*, 545 U.S. 967, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005), to hold that an Environmental Protection Agency (EPA) regulation promulgated in 2000 must be given *Chevron* deference and therefore overruled the Circuit's own 1978 interpretation of a statutory jurisdictional requirement needed to bring a citizen's suit. *See Dominion Energy*,

The issues in this case are not the same issues contested in *National Cable*. This is not a case in which OPM enacted new regulations interpreting the FLSA after the Federal Circuit had decided *Bobo* and *Adams II*. The OPM regulations referred to by plaintiffs were enacted in 1980. Pls.' Opp. 9 ("[O]n December 30, 1980, after notice and comment regarding its proposed FLSA regulations, 45 Fed.Reg.[ ]49[,]580 (July 25, 1980), OPM issued its final FLSA regulations."). The court in *Bobo* took note of them and chose not to follow them because of the Portal-to-Portal Act exception to the FLSA. *See Bobo,* 136 F.3d at 1467. Therefore, the Federal Circuit's adherence to the rule of *stare decisis* in *Adams II* was not contrary to the Court's holding in *National Cable* because it did not ignore OPM interpretations of a government regulation made after the Federal Circuit had decided *Bobo*. Likewise, this court would not be violating the rule of *National Cable* by following *Adams II* because plaintiffs do not rely on a new OPM regulation interpreting home-to-work driving under the FLSA issued subsequent to that decision. Because the issues in *National Cable* are readily distinguishable from the issues in this case, the court fails to see how the Supreme Court's decision in *National Cable* could vitiate the binding precedent of *Adams II*.[10]

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443 F.3d at 16-17

[10]It is also clear that *National Cable* has not changed the applicable substantive law regarding what is compensable as "time worked" under the FLSA since the time that the Federal Circuit decided *Adams II*. Not only was *National Cable* was decided in 2005, prior to the Federal Circuit's decision in *Adams II*,*compare National Cable,* 545 U.S. at 967, 125 S.Ct. 2688 *with Adams II*, 471 F.3d at 1321, but it also deals with provisions of the

d. *AARP II* Does Not Authorize the Court to Disregard Controlling Precedent Set Forth by the Federal Circuit

Plaintiffs argue in Plaintiffs' Memorandum that *AARP v. EEOC (AARP II),* 390 F.Supp.2d 437 (E.D.Pa.2005) "stands for the proposition that where a district court has found that a circuit court's prior judicial interpretation of a rule foreclosed deference to the agency, ... the court may ... hold the prior judicial determination to be non-binding ... and give broad deference to an agency's rule[-]making authority." Pls.' Memo. 13. Defendant counters that plaintiffs' interpretation of *AARP II* is erroneous, Def.'s Memo. 3-4, and that "[p]laintiffs have failed to demonstrate that the reasoning in *AARP [II]* supports their challenge to the binding effect of Federal Circuit precedent in this case," *id.* at 2.

In *AARP II,* the non-profit organization AARP filed suit against the Equal Employment Opportunity Commission (EEOC), challenging a regulation that "would exempt certain employer practices from the Age Discrimination in Employment Act." *AARP II,* 390 F.Supp.2d at 441. Earlier, the district court had granted summary judgment to the plaintiffs, *see AARP v. EEOC (AARP I),* 383 F.Supp.2d 705 (E.D.Pa.2005), but the EEOC moved for relief from that judgment "as a result of the Supreme Court's recent decision in [ *National Cable*]." *AARP II,* 390 F.Supp.2d at 441. The district court granted the motion by the EEOC, holding that, although the regulation was contrary to the

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Telecommunications Act and decisions by the Federal Communications Committee rather than the FLSA or Office of Personnel Management regulations, *National Cable,* 545 U.S. at 967, 125 S.Ct. 2688.

statute as previously construed by the Third Circuit, the regulation was still valid because the Third Circuit neither held its interpretation of the statute to be the only permissible interpretation nor addressed whether the agency interpretation as embodied in the challenged regulation was a permissible interpretation. *Id.* at 448. The district court came to this conclusion by relying on *National Cable,* which the district court claimed stood for the proposition "that where a court's holding states merely the 'best' interpretation of a statute, not the 'only permissible' interpretation, the court decision does not foreclose a later, differing agency interpretation." *Id.* (citing *National Cable,* 545 U.S. at 983, 125 S.Ct. 2688).

Plaintiffs' reliance on *AARP II* is misplaced. Plaintiffs do not allege a conflict between the interpretation of the FLSA by the Federal Circuit and the interpretation embodied in the applicable agency regulations. Rather, plaintiffs disagree with the interpretation of the FLSA as set forth by the Federal Circuit in *Adams II.* Plaintiffs appear to be asking the court to defer to plaintiffs' own interpretation of the applicable regulations and to the statutory interpretation that plaintiffs read into those regulations. *AARP II* does not support plaintiffs' claim that the court may disregard precedent from the Federal Circuit in order to adopt the interpretation of the regulations that plaintiffs favor.

Further, in both *AARP II* and *National Cable,* the courts were presented with an action by the relevant agency *after* the judicial precedent in question had been set. The underlying question in those cases, therefore, was whether a permissible agency interpretation of a statute trumps a prior judicial interpretation or vice versa. Neither case addressed

the binding effect of decisions by an appellate court regarding statutory interpretation when the appellate court has before it the agency regulation in question. Here, the Federal Circuit has previously examined and ruled on the interpretation of the FLSA with regard to driving time: time solely spent driving a government vehicle to and from work is not compensable. *Adams II*, 471 F.3d at 1325. Plaintiffs have not presented any precedent, and the court does not know of any, in which a trial court may disregard an interpretation of a statute by the appellate court by whose precedents the trial court is bound. Even if *AARP II* could be construed as supporting the view that a trial court may reject the precedent set forth by its appellate court, this court must follow Federal Circuit precedent, not the views of the District Court of Eastern Pennsylvania.

5. The Federal Circuit's Decision in *Billings* Does Not Obligate This Court to Ignore the Precedent of *Adams II* and Defer to DOL's FLSA Regulations.

Plaintiffs also argue that the Federal Circuit's decision in *Billings v. United States*, 322 F.3d 1328 (Fed. Cir. 2003), obligates this court to defer to DOL regulations. Pls.' Opp. 9-12 ("Plaintiffs submit that consistency with DOL's position requires this [c]ourt to declare plaintiffs' driving FLSA compensable."). In *Billings*, employees of the United States Border Patrol challenged OPM's regulation governing an FLSA exemption for "executive" employees on the grounds that it was in conflict with the definition of "executive" under DOL regulations. *Billings*, 322 F.3d at 1330. The Federal Circuit held that, while OPM regulations were required to harmonize with DOL regulations, there could be differences between the two if the variance was both reasonable and necessary "to accommodate

the difference between private and public sector employment." *Id.* at 1334. The *Billings* court determined that the differences with respect to the "executive employee exemption" met the relevant criteria and that OPM's regulation was therefore valid. *Id.* The court does not perceive how the Federal Circuit's decision in *Billings* could control the outcome of this case. The decision in *Billings* was based upon the exemption for "executive" employees in OPM regulations, not a regulation related to whether driving to and from work in a government-owned vehicle is compensable under the FLSA. *See id. passim.*

III. Conclusion

Plaintiffs have argued that the precedents of *Bobo* and *Adams II* are not controlling because this case involves distinguishable facts, because the applicable law has changed, and because the Federal Circuit was incorrect in its FLSA interpretation in *Bobo* and *Adams II*. Pls.' Opp. *passim*. For the foregoing reasons, the court fails to find merit in any of these arguments. Because the facts of this case are substantially identical to those in *Adams II*, and because there has been no change in the applicable law governing what constitutes "time worked" under the FLSA, this court follows the Federal Circuit precedent as to whether the FLSA requires employees to be compensated for driving between home and work in a government-owned vehicle. *See Coltec,* 454 F.3d at 1353. Based upon the precedent of *Adams II,* defendant is entitled to judgment as a matter of law. *See Adams II,* 471 F.3d at 1328 ("commuting done for the employer's benefit, under the employer's rules, is noncompensable if the labor beyond the mere act of driving the vehicle is *de minimis.*"). Because there are no genuine issues of material fact in dispute and

**defendant is entitled to judgment as a matter of law, *see Anderson*, 477 U.S. at 247, 106 S.Ct. 2505, Defendant's Motion is GRANTED and plaintiffs' remaining claims are DISMISSED. The Clerk of the Court shall ENTER JUDGMENT for defendant.**

**IT IS SO ORDERED.**

## 29 U.S.C. § 254.

***§ 254 Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation***

**(a) Activities not compensable**

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.], on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947–

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered

part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

***(b) Compensability by contract or custom***

Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to any activity, the employer shall not be so relieved if such activity is compensable by either--

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

***(c) Restriction on activities compensable under contract or custom***

For the purposes of subsection (b) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

* * * *

**Federal Personnel Manual System Letter No. 551-10**

PUBLISHED IN ADVANCE OF INCORPORATION IN FPM CHAPTER 551
RETAIN UNTIL SUPERSEDED
UNITED STATES CIVIL SERVICE COMMISSION
FEDERAL PERSONNEL MANUAL SYSTEM LETTER

*Washington, D.C. 20415*
April 30, 1976

FPM LETTER NO. 551 - 10

SUBJECT: Travel Time as "Hours of Work" Under FLSA

*Heads of Departments and Agencies:*

1. This is another in a series of FPM letters pertaining to the Fair Labor Standards Act, mentioned in FPM Letter 555-1, May 15, 1974.

2. One of the major changes introduced by the FLSA is the nature of the criteria to be used in determining what periods of time spent by non-exempt employees will be considered "hours of work" for compensation purposes. One issue of primary concern for Federal employees is travel time as "hours of work" under FLSA. This issue is discussed in detail in attachment 1 to this FPM letter.

3. Various subject areas concerning time spent traveling are addressed in the attached instructions under FLSA that have not been specifically addressed under title 5 However, one common subject area that is addressed under both statutes is time spent

traveling away from official duty station. Under both statutes, all such travel during regular working hours is considered "hours of work." However, time spent traveling away from official duty station that occurs outside regular working hours is treated differently under the two statutes. In general, authorized travel time outside regular working hours is "hours of work" under FLSA if an employee (1) performs work while traveling (including travel as a driver of a vehicle), (2) travels as a passenger to a temporary duty station and returns during the same day, or (3) travels as a passenger on nonwork days during hours which correspond to his/her regular working hours. Thus, whether time spent traveling outside regular working hours is considered "hours of work" under FLSA depends upon the kind of travel involved* * * *

* * * *

4. Effective Date. The instructions in attachment 1 to this FPM Letter are effective as of May 1, 1974; the effective date for coverage of Federal employees under the FLSA. Initial instructions concerning "hours worked" under FLSA were contained in attachment 4 to FPM Letter 551 - 1. These initial instructions addressed the treatment of time spent traveling by nonexempt employees during regular working hours on regular workdays and during corresponding hours on nonwork days. Furthermore, it was noted in FPM Letter 551 - 1 that the examples for determining "hours worked" under FLSA were not intended to be all inclusive; that accurate records concerning the hours worked by nonexempt employees be maintained; and that additional instructions would be forthcoming in supplemental issuances. All travel time by nonexempt

**employees on or subsequent to May 1, 1974, that meets the conditions specified within the attached instructions shall be considered as hours of work and necessary recomputations shall be made to determine any additional overtime pay entitlements under FLSA.**

***/s/***
**Raymond Jacobson**
**Executive Director**

Attachment to FPM Ltr. 551- 10

## TRAVEL TIME AS "HOURS OF WORK" UNDER FLSA

The instructions which follow apply only to time spent traveling by nonexempt employees under the FLSA. Existing rules applicable to time spent traveling by employees (both exempt and nonexempt) under title 5 (or other appropriate statute or regulations) continue in effect without change.

### A. INTRODUCTION

Whether time spent in authorized travel by a nonexempt employee is to be considered hours of work under the FLSA depends upon the kind of travel involved. This instruction contains basic principles for determining whether travel time is properly considered "hours of work" under the FLSA when the travel is:

- From home to work (work to home);
- Within the limits of the employee's official duty station;
- Away form official duty station and the travel involves the performance of work while traveling (including travel as a driver of a vehicle); and
- Away from official duty station as a passenger in a public or private conveyance. A further consideration for determining hours worked for travel as a passenger is whether the employee travels to and returns from a temporary duty station during the same day or whether the employee remains overnight at the temporary

duty station.

It is intended that the following basic principles, together with the examples in tables 1 through 4, will provide sufficient basis for sound determinations as to whether time spent traveling by nonexempt employees should be considered hours of work under the FLSA.

* * * *

C. HOME TO WORK TRAVEL (See table 1.)

Travel by an employee to and from work before and after the regular workday is a normal incident of employment. Normal travel from home to work is not counted as hours worked. However, there are certain situations where an employee may perform an activity as a requirement of his/her employing agency while traveling from home to work that could result in such travel time being considered hours worked. See table 1 for examples of home to work travel as "hours worked" under FLSA.

D. TRAVEL WITHIN THE LIMITS OF THE OFFICIAL DUTY STATION (See table 2.)

* * * *

E. TRAVEL AWAY FROM OFFICIAL DUTY STATION

1. Work Performed While Traveling (See table 3.)

Any work which an employee is required to perform while traveling shall be counted as hours worked. An employee required to drive a vehicle, pilot an aircraft, or (in circumstances to which the seaman exemption does not apply) pilot a boat to a given destination at the request and on behalf of the employing agency is working while traveling and shall have such travel

time counted as hours worked. Furthermore, any other employee required to perform work while traveling shall have the time spent traveling counted as hours worked. Bona fide meal periods are deducted from hours worked. Furthermore, under certain conditions sleeping periods or periods when an employee is relieved from duty are not included in hours worked (see notes 1 and 2, below). See table 3 for examples of work performed while traveling away from official duty station as "hours of work" under FLSA.

* * * *

2. Travel as a Passenger on a One-Day Assignment (See table 4.)

Travel as a passenger to and returning from a temporary duty station outside the limits of the official duty station during the same day si viewed as a part of the employee's principal duties for that particular day. The time spent in authorized travel as a passenger (by common carrier or by automobile) during the one-day assignment is considered working time. Bona fide meal periods are deducted from hours worked. Normal home to work (work to home) travel and time spent waiting at a common carrier terminal in excess of normal waiting time which occur outside regular working hours are not included in hours worked. See table 4 for examples of travel as a passenger on a one-day assignment away from official duty station as "hours of work" under FLSA.

* * * *

3. Travel as a Passenger That Keeps an Employee Away from Official Duty Station Overnight.

* * * *

F. SPECIAL SITUATIONS

1. Travel by Mode of Transportation Other Than That

Selected by the Employing Agency.

* * * *

2. Travel at a Time Other Than That Selected by the Employing Agency.

* * * *

3. Travel Which Involves Two or More Time Zones.

* * * *

Table 1 HOME TO WORK TRAVEL AS "HOURS OF WORK" UNDER FLSA

| Kind of Travel Involved: | Is travel time "hours of work"? |
|---|---|
| **A. Home to Work - Normal Situation** | |
| Normal home to work (work to home) travel | No |
| Employee drives a Government vehicle home (as a requirement of the employing agency) to respond to emergency calls immediately from his/her home. | Yes [1/] |
| Employee drives a Government vehicle home (as a requirementf the employing agency) to transport other employees home to work (or job site). | Yes [1/] |
| Employee reports at a designated meeting place and drives a vehicle (as a requirement of the employing agency) to transport other employees or equipment to a job site. | Yes [2/] |
| Employee reports at a designated meeting place and is transported (as a passenger) by Government vehicle to a job site | No |
| Employee reports at a designated meeting place (receives instructions, performs other work, or picks up and carries tools) and is transported As a passenger) by Government vehicle to a job site. | Yes [2/] |

s [2/]

meeting place (receives instructions, performs other work, or picks up and carries tools) and is transported As a passenger) by Government vehicle to a job site.

B. Home to Work - Emergency Situation

| | |
|---|---|
| Employee (at home) receives an emergency call outside regular working hours to return (travel) to normal duty location (or another job site within the limits of the official duty station.). | No |
| Employee (at home) receives an emergency call outside regular working hours to travel to a temporary duty station (outside the limits of the official duty station) and the distance traveled is greater than normal home to work travel. | Yes [2/] |

---

[1/] All time spent driving the vehicle home to work (work to home) is hours worked.

[2/] The travel from home to the designated meeting place (and return) is normal home to work travel. However, the performance of work or other activity which is an integral part of the employee's job (e.g., picking up tools or receiving instructions) at the designated meeting place constitutes the commencement of the employee's workday. All subsequent travel (to a job site and return) is hours worked.

[3/] If the distance to the temporary duty location (outside the limits of the official duty station) is in excess of the distance from the employee's home to normal duty location, the entire time spent traveling from the employee's home to the temporary duty location and return is hours worked. Conversely, if the distance to the temporary duty location is equal to or less than the distance from the employee's home to normal duty location, the time spent traveling to the temporary duty location and return is not hours worked.

## DEPARTMENT OF LABOR REGULATIONS

**29 C.F.R. § 785.35 Home to work; ordinary situation.**

An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime.

**§ 785.38 Travel that is all in the day's work.**

Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked. (Walling v. Mid-Continent Pipe Line Co., 143 F. 2d 308 (C.A. 10, 1944))

**785.41 Work performed while traveling.**

Any work which an employee is required to perform while traveling must, of course, be counted as hours worked. An employee who drives a truck, bus, automobile, boat or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding, except during bona fide meal periods or when he is permitted to sleep in adequate facilities furnished by the employer.

**29 C.F.R. § 790.2 Interrelationship of the two acts.**

(a) The effect on the Fair Labor Standards Act of the various provisions of the Portal Act must necessarily be determined by viewing the two acts as interrelated parts of the entire statutory scheme for the establishment of basic fair labor standards. The Portal Act contemplates that employers will be relieved, in certain circumstances, from liabilities or punishments to which they might otherwise be subject under the Fair Labor Standards Act. But the act makes no express change in the national policy, declared by Congress in section 2 of the Fair Labor Standards Act, of eliminating labor conditions "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." The legislative history indicates that the Portal Act was not intended to change this general policy. The Congressional declaration of policy in section 1 of the Portal Act is explicitly directed to the meeting of the existing emergency and the correction, both retroactively and prospectively, of existing evils referred to therein. Sponsors of the legislation in both Houses of Congress asserted that it "in no

way repeals the minimum wage requirements and the overtime compensation requirements of the Fair Labor Standards Act" that it "protects the legitimate claims" under that act, and that one of the objectives of the sponsors was to "preserve to the worker the rights he has gained under the Fair Labor Standards Act." It would therefore appear that the Congress did not intend by the Portal Act to change the general rule that the remedial provisions of the Fair Labor Standards Act are to be given a liberal interpretation and exemptions therefrom are to be narrowly construed and limited to those who can meet the burden of showing that they come "plainly and unmistakably within (the) terms and spirit" of such an exemption.

[Footnotes Omitted]

**§ 790.6 Periods within the "workday" unaffected.**

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the "workday" proper, roughly described as the period "from whistle to whistle," and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period. Under the provisions of section 4, one of the conditions that must be present before "preliminary" or "postliminary" activities are excluded from hours worked is that they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that

activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted. The principles for determining hours worked within the "workday" proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act, which is concerned with this question only as it relates to time spent outside the "workday" in activities of the kind described in section 4.

(b) "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period * * * * If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his "workday" commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time.

[Footnotes Omitted]

**§ 790.7 "Preliminary" and "postliminary" activities.**

(a) Since section 4 of the Portal Act applies only to situations where employees engage in "preliminary" or "postliminary" activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregarded, and whether the relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section. On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not "preliminary" or "postliminary" activities outside the workday. And even where there is a contract, custom, or practice to pay for time spent in such a "preliminary" or "postliminary" activity, section 4(d) of the Portal Act does not make such time hours worked under the Fair Labor Standards Act, if it would not be so counted under the latter act alone.

(b) The words "preliminary activity" mean an activity engaged in by an employee before the commencement of his "principal" activity or

activities, and the words "postliminary activity" means an activity engaged in by an employee after the completion of his "principal" activity or activities. No categorical list of "preliminary" and "postliminary" activities except those named in the act can be made, since activities which under one set of circumstances may be "preliminary" or "postliminary" activities, may under other conditions be "principal" activities. The following "preliminary" or "postliminary" activities are expressly mentioned in the act: "Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which (the) employee is employed to perform."

(c) The statutory language and the legislative history indicate that the "walking, riding or traveling" to which section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working hours. For example, travel by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of "walking, riding or traveling" described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be "walking, riding, or traveling" of the type referred to in section 4(a). One example would be a

traveling employee whose duties require him to travel from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job for one of his employer's customers. In situations such as these, where an employee's travel is not of the kind to which section 4(a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue to be determined by principles established under this act, without reference to the Portal Act

(d) An employee who walks, rides or otherwise travels while performing active duties is not engaged in the activities described in section 4(a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area. In such a situation, the walking, riding, or traveling is not segregable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel "to and from the actual place of performance" of the principal activities he is employed to perform.[47]

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[47]Senator Cooper, after explaining that the "principal" activities referred to include activities which are an integral part of a "principal" activity (Senate Report, pp. 47, 48), that is, those which "are indispensable to the performance of the productive work," summarized this provision as it appeared in the Senate Bill by stating: "We have clearly eliminated from compensation

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as "Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out." The phrase, actual place of performance," as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and end of the workday to which this section relates includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the performance of the principal activity or activities, and the return travel from that place at the end of the workday. However where an employee performs his principal activity at various places (common examples would be a telephone lineman, a "trouble-shooter" in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act has not significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding

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walking, traveling, riding, and other activities which are not an integral part of the employment for which the worker is employer." 93 Cong. Rec. 2299.

by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.

(h) As indicated above, an activity which is a "preliminary" or "postliminary" activity under one set of circumstances may be a principal activity under other conditions. This may be illustrated by the following example: Waiting before the time established for the commencement of work would be regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities. The difference in the two situations is that in the second the

employee was engaged to wait while in the first the employee waited to be engaged.

[Footnotes Omitted]

**29 C.F.R. § 790.8 "Principal" activities.**

(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the "principal" activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted. But before it can be determined whether an activity is "preliminary or postliminary to (the) principal activity or activities" which the employee is employed to perform, it is generally necessary to determine what are such "principal" activities.

The use by Congress of the plural form "activities" in the statute makes it clear that in order for an activity to be a "principal" activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job; rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several "principal" activities during the workday. The "principal" activities referred to in the statute are activities which the employee is "employed to perform"; they do not include noncompensable "walking, riding, or traveling" of the type referred to in section 4 of the act. Several guides to determine what constitute "principal activities" was suggested in the legislative debates. One of the members of the conference committee stated to the House of Representatives that "the realities of

industrial life," rather than arbitrary standards, "are intended to be applied in defining the term 'principal activity or activities'," and that these words should "be interpreted with due regard to generally established compensation practices in the particular industry and trade." The legislative history further indicates that Congress intended the words "principal activities" to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed. A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered "sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work."

(b) The term "principal activities" includes all activities which are an integral part of a principal activity. Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal Bill. They are the following:

[Footnote: (1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term]

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30

minutes distributes clothing or parts of clothing at the work-benches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.]

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity. However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.

[Footnotes Omitted]

**U.S. Dept of Labor, Wage and Hour Div., Field Operations**

**Handbook,**

**31d SPECIAL PROBLEMS**

**31d00 Ambulance Services**

(a) Numerous hours worked questions may arise with respect to employees engaged in ambulance services. The most common are these:

* * * *

(5) Employee who takes ambulance to his home. In the ordinary case where an employer permits an employee to drive an ambulance to and from his home for the employee's own convenience, the time so spent is not hours worked. If the employee is required to take the ambulance home in order to respond to calls immediately, all the time spent in driving would be hours worked * * * The time the ambulance spends parked idly outside the employee's residence, and the employee is free to engage in his own pursuits subject only to the understanding that he will leave word at his home or with company officials where he may be reached, would not be regarded as hours worked under the Act. * * * * If the ambulance is parked at the employee's home, the employee would be considered working from the time he sets out on call until the time he returns to his home.

## OPM REGULATIONS

### 5 C.F.R. § 551.401 Basic Principles

(a) All time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency is "hours of work." Such time includes:

(1) Time during which an employee is required to be on duty;

(2) Time during which an employee is suffered or permitted to work; and

(3) Waiting time or idle time which is under the control of an agency and which is for the benefit of an agency.

### 5 C.F.R. § 551.422 Time spent traveling.

(a) Time spent traveling shall be considered hours of work if:

(1) An employee is required to travel during regular working hours;

(2) An employee is required to drive a vehicle or perform other work while traveling;

(3) An employee is required to travel as a passenger on a one-day assignment away from the official duty station; or

(4) An employee is required to travel as a passenger on an overnight assignment away from the official duty station during hours on nonworkdays that correspond to the employee's regular working hours.

(b) An employee who travels from home before the

regular workday begins and returns home at the end of the workday is engaged in normal "home to work" travel; such travel is not hours of work. When an employee travels directly from home to a temporary duty location outside the limits of his or her official duty station, the time the employee would have spent in normal home to work travel shall be deducted from hours of work as specified in paragraphs (a)(2) and (a)(3) of this section.

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No. 09-736

# In the Supreme Court of the United States

STEVEN A. HUDSON, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioners' home-to-work commutes in government-owned vehicles are compensable work under the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, and Section 4(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. 254(a).

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# In the Supreme Court of the United States

No. 09-736

STEVEN A. HUDSON, ET AL.,

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 575 F.3d 1332. The opinion of the Court of Federal Claims (Pet. App. 18a-52a) is reported at 83 Fed. Cl. 236.

### JURISDICTION

The judgment of the court of appeals was entered on August 5, 2009. On October 22, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 18, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, generally requires that an employer

pay overtime compensation when it employs a non-exempt employee for a workweek longer than 40 hours. 29 U.S.C. 207(a), 213(a)(1). The Act does not define "work" or "workweek," and this Court's early cases construed the term "work" broadly as activity "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." See *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 25 (2005) (*IBP*) (citing *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590 (1944), *Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944), and *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)). The substantial and unexpected scope of employer liability under those early decisions led Congress to enact the Portal-to-Portal Act of 1947 (Portal-to-Portal Act), 29 U.S.C. 251 *et seq.*, to narrow the coverage of the FLSA. See *IBP*, 546 U.S. at 26-27, 41.

As is relevant here, Section 4(a) of the Portal-to-Portal Act relieves employers from FLSA overtime liability for the following employee activities, unless such activities are compensable under a contemporaneous contract or "custom or practice" in effect at the place of employment (29 U.S.C. 254(b)(2)):

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or sub-

> sequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. 254(a).

Regulations promulgated by the United States Department of Labor (DOL) and Office of Personnel Management (OPM) explain that "[a]n employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel, which is a normal incident of employment" and "not worktime." 29 C.F.R. 785.35; see 5 C.F.R. 551.422(b); 29 C.F.R. 790.7(c). Such home to work travel, however, does not encompass an employee's transit to a work site that occurs after the employee has traveled from his home to an employer-specified location and started to perform the day's work. Where an employee is "required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place" is compensable as work. 29 C.F.R. 785.38.

2. Petitioners are four individuals who have been employed by the Bureau of Alcohol, Tobacco and Firearms and components of the Department of Homeland Security, and who brought suit in the Court of Federal Claims alleging that the government failed to pay them overtime compensation as required by the FLSA. Pet. App. 2a, 18a. The parties subsequently settled all of the claims except the claim that time spent commuting between home and work in a government vehicle was work subject to overtime compensation. Pet. 9-10. Proceedings with respect to the commuting time claim were stayed pending appellate review in another case, in which the home-to-work driving of several thousand law enforcement officers was ultimately held not compensa-

ble under the FLSA. Pet. App. 20a; see *Adams* v. *United States*, 65 Fed. Cl. 217 (2005), aff'd, 471 F.3d 1321 (Fed. Cir. 2006), cert. denied, 128 S. Ct. 866 (2008). The stay was lifted after the petition for a writ of certiorari in *Adams* was denied. Pet. App. 21a-22a.

Thereafter, upon the government's motion, the Court of Federal Claims entered summary judgment dismissing the commuting time claims in this case. Pet. App. 18a-52a. The court explained that this result was compelled by circuit precedent established in *Adams* and in *Bobo* v. *United States*, 136 F.3d 1465 (Fed. Cir. 1998). The court observed that here, as in *Adams*, the plaintiffs' claim was limited by stipulation to time solely spent driving between home and work, and that, under *Bobo* and *Adams*, "commuting done for the employer's benefit, under the employer's rules, is noncompensable if the labor beyond the mere act of driving the vehicle is *de minimis*," Pet. App. 20a (quoting *Adams*, 471 F.3d at 1328). The plaintiffs had failed to identify any material difference between their home-to-work driving and the home-to-work driving that had been held non-compensable in *Bobo* and *Adams*. *Id.* at 30a-34a.

3. The court of appeals affirmed. Pet. App. 1a-17a. Describing the dispute in this case as "identical in all material respects to the dispute" in *Adams* and as "similar to the dispute" in *Bobo*, *id.* at 1a, the court endorsed the lower court's conclusion that the case was controlled by *Bobo* and *Adams*, and rejected the appellants' argument that those decisions were either distinguishable or not binding.

In *Bobo*, the court had addressed a claim by Border Patrol dog handlers who were required to transport their dogs with them while commuting to and from work, and, for this purpose, were required to commute in spe-

cial government vehicles, subject to certain requirements and restrictions. Pet. App. 2a-3a. To determine whether the dog handlers' home-to-work commute constituted compensable work as "an integral and indispensable part of the principal activities" for which they were employed, *Bobo* adopted the Second Circuit's approach of examining a plaintiff's commuting activity in light of the degree to which the "activity is undertaken for the employer's benefit," the degree to which it is "indispensable * * * to the primary goal of the employee's work," and the degree of "choice the employee has in the matter." 136 F.3d at 1467 (quoting *Reich* v. *New York City Transit Auth.*, 45 F.3d 646, 650 (2d Cir. 1995)). Where the employee's work activity during the commute "is truly minimal, it is the policy of the law to disregard it." *Ibid.* (quoting *Reich*, 45 F.3d at 650). The *Bobo* court held that, while compulsory restrictions were placed on the dog handlers' commutes that benefitted the Border Patrol and were closely related to the employees' principal work activities, those restrictions were negligible as a whole because their impact was "infrequent, of trivial aggregate duration, and administratively impracticable to measure." *Id.* at 1468.

In *Adams*, the court addressed the claim of several thousand law enforcement officers who were required to commute in government vehicles subject to certain restrictions, and to keep their weapons and other job-related equipment with them during their commutes. Pet. App. 4a. Following the analysis in *Bobo*, the court in *Adams* held that the appellants' commuting time was similarly not compensable under the FLSA. *Ibid.* (citing *Adams*, 471 F.3d at 1326-1328).

In light of *Bobo* and *Adams*, the court of appeals here stated that its task was "mainly to determine

whether there is any reason for us to distinguish or depart from the *Adams* and *Bobo* decisions." Pet. App. 1a. The court found no such reason. Finding no merit in petitioners' contention that the earlier decisions were at odds with decisions of this Court and with relevant regulations and administrative interpretations, *id.* at 8a-16a, and finding that petitioners had offered no factual distinction justifying a different result here than in *Bobo* and *Adams*, *id.* at 16a-17a, the court affirmed the dismissal of petitioners' home-to-work driving claims. *Id.* at 17a.

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. In 2008, this Court denied a petition for a writ of certiorari in *Adams*, which was "identical in all material respects" to this case. Pet. App. 1a. No events in the intervening years require a different result, and the Court should deny the petition for a writ of certiorari on this matter again.

1. The court of appeals correctly determined that petitioners are not entitled to overtime compensation for commuting between home and work with government vehicles.

Section 4(a)(1) of the Portal-to-Portal Act distinguishes between an employee's time spent on principal "work" activities (that is, the "principal activity or activities which [an] employee is employed to perform"), for which the FLSA requires overtime pay, and noncompensable time spent "traveling to and from the actual place of performance" of such "principal activity or activities" before the employee's principal work activities begin or after they cease. 29 U.S.C. 254(a)(1). This

Court has held that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under § 4(a) of the Portal-to-Portal Act." *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 37 (2005) (citing *Steiner* v. *Mitchell*, 350 U.S. 247 (1956)).

This Court has also held, however, that "the fact that certain preshift activities are *necessary* for employees to engage in their principal activities *does not mean* that those preshift activities are 'integral and indispensable' to a 'principal activity.'" *IBP*, 546 U.S. at 40-41 (emphases added). All home-to-work commutes are "necessary" for an employee to perform the principal activity for which he is employed, yet it is undisputed that an employee's normal commute is not compensable under the FLSA. Cf. 29 C.F.R. 785.35, 790.7(c); cf. also 5 C.F.R. 551.422(b). Even before Congress enacted the Portal-to-Portal Act to restrict the FLSA's application to travel time, this Court indicated that "traveling from workers' homes to [the workplace]" does not qualify as "work"—that is, activity both "controlled or required by the employer" and "pursued necessarily and primarily for the benefit of the employer and his business." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 691-692 (1946) (citation omitted); *IBP*, 546 U.S. at 25; cf. *Reich* v. *New York City Transit Auth.*, 45 F.3d 646, 651-652 (2d Cir. 1995) (applying this "concept of compensable work" to resolve a dispute over home-to-work commuting).[1] A home-to-work commute primarily benefits the

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[1] The travel time that the Portal-to-Portal Act excludes from compensation includes travel *within* the employer's premises, *i.e.*, travel much more closely related to the employee's work than commuting. As his Court noted in *IBP*, "walking from a time-clock near the factory gate to a workstation is certainly necessary for employees to begin their work, but it is indisputable that the Portal-to-Portal Act evinces

employee because it accommodates the employee's choice of where to live; its duration is determined by that personal choice; and, when an employee elects to live farther from work (and accept a longer commute), that choice does not benefit the employer or his business.[2]

In some circumstances, an employee may perform significant activities during a home-to-work commute that sufficiently alter its character to make it an "integral and indispensable" part of the employee's primary work activity that primarily benefits his employer. The court of appeals, like its sister circuits, has thus properly evaluated commuting-based overtime claims by weighing the degree to which activities associated with the employee's home-to-work travel are "undertaken for the employer's benefit," the degree to which they are "indispensable * * * to the primary goal of the employee's work," and the degree of "choice the employee has in the matter." *Bobo* v. *United States*, 136 F.3d 1465, 1467-1468 (Fed. Cir. 1998) (quoting *Reich*, 45 F.3d at 650). Moreover, where the work-related aspects of an employee's commute are negligible in light of the commute's normal benefit to the employee, the courts of

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Congress' intent to repudiate *Anderson*'s holding that such walking time was compensable under the FLSA." 546 U.S. at 41.

[2] While petitioners assert (Pet. 21) that "even a significant, direct benefit to the employee" will not make an activity non-compensable under *IBP* and *Steiner*, neither case addressed the process of distinguishing between activities that primarily benefit the employer and those that do not. See *IBP*, 546 U.S. at 25, 32 (noting rule that activity must be "primarily for the benefit of the employer" to constitute compensable work in case where litigants did not challenge ruling that donning and doffing unique protective gear was an "integral and indispensable" part of employees' principal work activity); *Steiner*, 350 U.S. at 252, 256 (no challenge to similar ruling).

appeals have held the time spent in such commutes to be non-compensable. See *Adams*, 471 F.3d at 1327; *Bobo*, 136 F.3d at 1468; *Reich*, 45 F.3d at 650, 652-653 (commuting by dog handlers required to transport their dogs between home and work was not compensable where work-related duties during commute were "neither substantial, nor regularly occurring"); *Aiken* v. *City of Memphis*, 190 F.3d 753, 758 (6th Cir. 1999) (following *Bobo* and *Reich* and holding that commutes by K-9 officers required to transport their dogs between home and work in city vehicles are not compensable where no "more than a de minimis amount of time during their commutes" was spent on work activities), cert. denied, 528 U.S. 1157 (2000).

2. Petitioners do not dispute that the decision of the court of appeals here was supported by its prior decisions in *Bobo* and *Adams*. Rather, petitioners argue that the Federal Circuit misconstrued the FLSA and the Portal-to-Portal Act in those cases, and, therefore, erred here as well by following those cases. Petitioners are incorrect.

a. Petitioners contend (Pet. 14-16) that in these cases the Federal Circuit applied a test for determining whether travel is a "principal activity" under Section 4(a)(1) of the Portal-to-Portal Act that is different than the test for determining whether preliminary or postliminary activities are "principal activities" under Section 4(a)(2). They further contend that this "two-tiered approach to Section 4(a)" erroneously makes driving that is an "integral and indispensable" part of a principal work activity non-compensable unless an employee also performs other work while driving. Pet. 12, 16. Petitioners mischaracterize the Federal Circuit's analysis. Nothing in that court's decisions suggests that it

interprets "principal activities" in Section 4(a)(1) differently from the same term in Section 4(a)(2). Both here and in *Adams* the court applied its prior decision in *Bobo* to the facts of the case, and *Bobo* expressly invoked this Court's ruling in *Steiner* that an activity is compensable under Section 4(a) when it is "an integral and indispensable part of the principal activities for which covered workmen are employed." *Bobo*, 136 F.3d at 1467 (quoting *Steiner*, 350 U.S. at 256).

The court of appeals applied the correct legal standard, but it did not accept petitioners' contention that their particular commutes were an "integral and indispensable part" of their principal work activities. Significantly, in this case (as in *Adams*), the commuting time claim was presented for adjudication after the dismissal, pursuant to a settlement, of all relevant FLSA claims other than those for time *solely* spent driving a government vehicle between home and work. Pet. App. 29a-30a. Therefore, any time petitioners spent performing work-related activities in addition to such driving are not at issue here.

The only question before the court of appeals was whether petitioners should be compensated for driving to and from their homes in government vehicles. The court accepted that the *restrictions* placed upon the employees' commutes, *i.e.*, that they not make personal stops, were compulsory, for the benefit of the agency, and closely related to the employees' principal work activities, but found these restrictions to be "insufficient to pass the *de minimis* threshold," Pet. App. 3a (quoting *Bobo*, 136 F.3d at 1468); see *Adams*, 471 F.3d at 1327. These restrictions, therefore, were insufficient to render personal commutes an "integral and indispensable part" of their principal work activities.

Petitioners' misreading of the test applied by the Federal Circuit appears to stem from their dwelling upon the *Adams* court's statement, paraphrasing the holding in *Bobo*, that "commuting done for the employer's benefit, under the employer's rules, is noncompensable if the labor beyond the mere act of driving the vehicle is *de minimis*." *Adams*, 471 F.3d at 1328. See Pet. 8, 12, 15. From this, petitioners appear to assume that the court found the commuting in question to have been done for the employer's benefit and as a requirement of employment. Neither this case, *Adams*, nor *Bobo*, however, involve a requirement that employees commute, nor do they involve a benefit to the government from the employees' commuting. The requirement in question is only that when the employees commute, they utilize government vehicles for this purpose. And, the benefit to the government mentioned in *Adams* and *Bobo* was not a result of the commuting, but of the fact that the vehicle was available for response to emergencies, *Adams*, 471 F.3d at 1323, or for transporting dogs, *Bobo*, 136 F.3d at 1466-1467. Thus, petitioners' commuting time is not an integral and indispensable part of their principal activities. In any event, the question whether petitioners' commutes constitute an integral and indispensable part of their principal activities involves application of a settled legal standard to their particular factual situation and does not merit this Court's review.

b. Petitioners argue (Pet. 16-25) that review is warranted to resolve a circuit conflict over the proper application of Section 4(a)(1). No such conflict exists.

First, to the extent that the purported conflict concerns the so-called "two-tiered approach to Section 4(a)," Pet. 16, petitioners' argument stems from their

misreading of the Federal Circuit's decisions. As noted above, the Federal Circuit did not adopt the approach petitioners attribute to it. Second, while petitioners acknowledge that two circuits are in agreement with the Federal Circuit (Pet. 16 (citing *Aiken*, 190 F.3d at 758 and *Rutti* v. *LoJack Corp.*, 578 F.3d 1084 (9th Cir. 2009)), petitioners fail to cite *any* precedential decision from *any* circuit holding home-to-work driving to be compensable work under the FLSA. Instead, petitioners rely upon decisions in which activities *other than* commuting were held to be compensable, and decisions in which commuting time was held *non*-compensable for reasons that, according to petitioners, make those decisions distinguishable.

A number of the decisions upon which petitioners rely conclude that an employee performs an integral and indispensable part of his principal work activity when driving his employer's vehicle between the employer's staging area and a work site in order to transport heavy equipment, tools, or supplies essential for performing his and others' job duties at the site.[3] One reflects that

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[3] See, *e.g.*, *Secretary of Labor* v. *E.R. Field, Inc.*, 495 F.2d 749, 750-751 (1st Cir. 1974) (electrician hired to work at construction site works when driving employer's truck to transport necessary tools and equipment from employer's shop to jobsite); *Mitchell* v. *Mitchell Truck Line, Inc.*, 286 F.2d 721, 723-725 (5th Cir. 1961) (truck drivers hired to deliver construction materials work when driving trucks from employer's truck yard to loading facility and when returning to yard after dropping load at destination); *DA&S Oil Well Servicing, Inc.* v. *Mitchell*, 262 F.2d 552, 554-555 (10th Cir. 1958) (employees hired to perform services at oil well work when driving trucks that transport necessary heavy equipment back from well site to employer's base); cf. *Bonilla* v. *Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1345 n.7 (11th Cir.) (discussing unpublished and non-precedential decision holding that employees work when driving vehicles that transport necessary

travel at the end of the day necessary to maintain the tools used to do the employee's principal work can be compensable.[4] The issues implicated by an overtime claim based on circumstances materially similar to home-to-work commuting were thus never addressed or decided in those decisions, which themselves recognize that overtime claims are highly contextual and "must be decided upon [their] peculiar facts." See, *e.g.*, *DA&S Oil Well Servicing, Inc.* v. *Mitchell*, 262 F.2d 552, 554-555 & n.4 (10th Cir. 1958); accord *Baker* v. *Barnard Constr. Co.*, 146 F.3d 1214, 1218-1219 (10th Cir. 1998) (*Barnard Constr.*).[5]

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tools from employer's lot to work site), cert. denied, 552 U.S. 1077 (2007). The same result holds true when an employee must transit from one employer-specified location to another in the middle of the workday. See *United Transp. Union Local 1745* v. *City of Albuquerque*, 178 F.3d 1109, 1118-1119 (10th Cir. 1999).

[4] See *Baker* v. *Barnard Constr. Co.*, 146 F.3d 1214 (10th Cir. 1998). *Baker* held that welders hired to perform welding services at a worksite must be compensated for the "travel time associated with refueling and restocking the welding rigs" if such travel is proven to be an integral and indispensable part of their principal work activity, *id.* at 1215-1217, and that a jury must decide whether it was necessary "to transport the rigs from the work site each day to refuel and restock" or whether such maintenance could be performed on site. *Id.* at 1219. Because *Baker* concerned only "whether the travel associated with refueling and restocking the rigs" is compensable work, *ibid.*, it did not address whether a welder must be compensated for his commute home if he drives there after refueling and restocking.

[5] The Ninth Circuit, in a unpublished decision, has ruled that work foremen who were employed to drive their specially equipped company trucks to an out-of-town jobsite in order to transport equipment, tools, and crew members to the site each day must be compensated for driving the trucks back to town (often to their homes) because their employer required that they drive the trucks away from the worksite and prohibited them from returning the trucks to the company office in

Petitioners (Pet. 22) also rely upon two Second Circuit decisions in which the commuting in question was held *non*-compensable: *Singh* v. *City of New York*, 524 F.3d 361 (2008) (Sotomayor, J.), and *Reich*. Petitioners argue that the employer requirements associated with the commuting in those cases were less significant than those involved here,[6] and they speculate that under facts closer to those involved here, the Second Circuit would reach a contrary result. There is no basis for a writ of certiorari to resolve a conflict between the decision of the Federal Circuit and hypothetical future decisions of the Second Circuit. Petitioners also argue that in *Singh* and *Reich* the Second Circuit did not apply the two-tier test that petitioners attribute to the Federal Circuit. As noted, however, the Federal Circuit did not apply such a test. It applied the same test as did the Second Circuit, to facts that were somewhat different from the facts in the Second Circuit cases, and reached the same result as did the Second Circuit. This is not a conflict between circuits.

c. Petitioners argue (Pet. 26-29) that the Federal Circuit's construction of the FLSA and the Portal-to-Portal Act conflicts with that of DOL. The court of ap-

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town. See *Dole* v. *Flint Eng'g & Constr. Co.*, 914 F.2d 262 (1990) (Table). That decision is consistent with the outcome in this case, and, in any event, would not give rise to a circuit conflict warranting this Court's review because it has no precedential effect for future cases. See 9th Cir. R. 36-3(a).

[6] Petitioners also exaggerate the difference. For example, they stress that in *Reich*, unlike in *Bobo*, "'the handlers were not required to drive,' at all." Pet. 23 (quoting *Reich*, 45 F.3d at 651). In the sentence from which petitioners quote, however, the court also stated that the handlers' commute was required to be in a private vehicle. As a practical matter, unless the handler had someone to drive him, he was required to drive.

peals considered and rejected this argument, correctly concluding in this case that *Bobo* and *Adams* were consistent with the pertinent regulations and interpretations issued by OPM, and that these, in turn, were consistent with those of DOL. Pet. App. 11a-16a.[7] The court noted that under OPM's regulations, "an employee 'who travels from home before the regular workday begins and returns home at the end of the workday is engaged in normal "home to work" travel; such travel is not hours of work,'" *Id.* at 11a (citing 5 C.F.R. 551.422(b)), and that, likewise, "Section 553.221(e) of the Labor Department regulations, 29 C.F.R. § 553.221(e), establishes the baseline principle that '[n]ormal home to work travel is not compensable.'" *Id.* at 13a (citing 29 C.F.R. 785.35). Petitioners fault the court of appeals for treating the latter regulations as "aces of trump," Pet. 26, and argue that the cited language does not mean that all home to work travel is non-compensable. The regulations do mean, however, that home to work travel is not compensable in the absence of additional requirements that turn the travel time into compensable work, and none of the DOL regulations upon which petitioners rely states that the requirements of the kind involved here are sufficient to do so.[8]

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[7] Congress authorized OPM to administer the FLSA in the Federal sector. See 29 U.S.C. 204(f); see also H.R. Rep. No. 913, 93d Cong., 2d Sess. 28 (1974) (indicating Congress wanted Civil Service Commission (OPM's predecessor) to administer the FLSA in a manner generally consistent with the interpretations adopted by DOL in other sectors of the economy); *Billings* v. *United States*, 322 F.3d 1328, 1333-34 (Fed. Cir.), cert. denied, 540 U.S. 982 (2003).

[8] See, *e.g.*, 29 C.F.R. 790.7(d) ("carrying by a logger of a portable power saw or other heavy equipment * * * on his trip into the woods to the cutting area" is not covered by Section 4(a)); 29 C.F.R. 785.41

As petitioners note, OPM did at one time issue guidance which could be construed as supporting petitioners' position. Pet. 5 (citing Federal Personnel Manual Letter No. 551-10 (Apr. 30, 1976)). However, OPM withdrew that guidance when it abolished its Manual in 1993 (effective 1994). See *Nebblett* v. *OPM*, 237 F.3d 1353, 1358 (Fed. Cir. 2001). OPM's superseding guidance states that commuting time "may be hours of work to the extent that the employee is required to perform substantial work under the control and direction of the employing agency," but that "[t]he fact that an employee is driving a Government vehicle in commuting to and from work is not a basis for determining that commuting time is hours of work." OPM, *Hours of Work for Travel* (visited Feb. 17, 2010) <http://www.opm.gov/oca/worksch/html/travel.asp>. This agency guidance is not inconsistent with any applicable regulation or interpretation issued by either DOL or OPM, and, as the court of appeals observed, it "is an authoritative interpretation that warrants deference." Pet. App. 12a (citing *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)).

d. Petitioners contend (Pet. 30-32) that the court of appeals applied a *de minimis* threshold in this case contrary to this Court's decision in *Anderson*. That contention does not bear scrutiny or merit this Court's review.

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("work" required to be performed while traveling is compensable; employee whose "work" is to drive a vehicle or ride in one as a helper is working while riding); Wage & Hour Div., U.S. Dep't of Labor, *Field Operations Handbook* § 31d (May 30, 1986) <http://www.dol.gov/whd/FOH/index.htm> (addressing "special problems" applicable to employees employed to drive ambulances); *id.* § 31d00(a)(5). As the court of appeals noted, the cited Handbook's discussion of the "special problems" concerning ambulance drivers "cannot simply be extrapolated to all public servants who are required to use their official vehicles for commuting." Pet. App. 14a.

*Anderson* concluded that "negligible" amounts of time performing work activities "may be disregarded" as *de minimis* under the FLSA. 328 U.S. at 692. "It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved." *Ibid.*

Nothing in *Anderson* suggests that this is the only way in which a "*de minimis*" concept might have relevance. In this case, the petitioners engaged in activity—commuting to and from work—that is normally not compensable. They received a government car in which to conduct this activity, on certain conditions, including that they not make personal stops during their commute. Especially in light of the valuable benefit received, a reasonable "restriction on their use of a government vehicle during their commuting time," *Bobo*, 136 F.3d at 1468, was a *de minimis* one that did not transform their entire commute into work. Cf. 29 C.F.R. 785.17 (on-call employee who uses time for own purposes is not working). Abiding by this restriction is not a service to the employer, and it has no effect upon the nature or length of the time petitioners spend driving between home and work, other than to prevent that time from being interrupted or lengthened for purposes other than commuting. The court of appeals properly held that "such a restriction on their use of a government vehicle during their commuting time does not make this time compensable." Pet. App. 4a (quoting *Bobo*, 136 F.3d at 1468).

e. The court of appeals correctly held that the plaintiffs had the burden of proof with respect to whether the activity in question constituted compensable work under the FLSA. Pet. App. 15a n.1; *Adams*, 471 F.3d at 1325-1326. In so holding, the court here and in *Adams* relied

upon this Court's statement in *Anderson* that "[a]n employee who brings suit * * * for unpaid minimum wages or unpaid overtime compensation * * * has the burden of proving that he performed work for which he was not properly compensated." 328 U.S. at 686-687. As the *Adams* court explained, "[t]he burden to prove that such work was performed necessarily includes the burden to demonstrate that what was performed falls into the category of compensable work." 471 F.3d at 1326 (citing *Barnard Constr.*, 146 F.3d at 1216).

Petitioners argue (Pet. 32-33) that the Portal-to-Portal Act is an "exception" to the FLSA overtime requirements and that, therefore, the employer has the burden of proving that plaintiffs' commuting time falls within the Portal-to-Portal Act. As the court here and in *Adams* correctly recognized, however, the compensability of the driving in these cases did not turn upon an exception, but upon whether the driving constituted compensable work at all. *Anderson* held that the employees bear the burden of proof on that question.

Implicit in petitioners' argument is that everything an employee does is presumed to be compensable work if the employee so characterizes it, and that it is the employer's burden to prove the characterization wrong. There is no basis for this premise. Consistent with this court's teaching in *Anderson*, the court of appeals correctly assigned to petitioners the burden of proving that they were performing compensable work while commuting.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

STEVEN A. HUDSON, MICHAEL S. MORGAN, VANESSA R. SPENCER, and JOHN A. WINSLOW,
*Petitioners,*

v.

UNITED STATES,
*Respondent*

**On Petition for a Writ of Certiorari To the United States Court of Appeals For the Federal Circuit**

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In the decision below, the Federal Circuit reaffirmed its conclusion in *Bobo,* that an employee's required driving of a work vehicle, controlled by his employer and for the employer's benefit, is not a compensable "principal activity" under § 4(a)(1), unless the employer demands "labor beyond" the required driving.

As the petition explained, the premises of the *Bobo* rule have now been wholly undermined, first by this Court's decision in *Alvarez* – which both affirmed *Steiner*'s "integral and indispensable" test and settled that "[t]here is no plausible argument that ["principal activities"] * * * mean[s] something different" in Sections 4(a)(1) and (2), 546 U.S. at 34 – and now by the Second Circuit's decision in *Singh*, which made clear that its earlier *Reich* decision, whose "interpretation of the [Portal] Act," *Bobo* had purported to adopt, did not in fact construe that statute and did not, as the Federal Circuit had assumed, announce any rule for cases where driving is employer-required.

The petition further showed that the *Bobo* rule, in addition to its basic incompatibility with this Court's decisions, is irreconcilable with the longstanding interpretation of the statute by the Secretary of Labor – and that the magnitude and practical significance of the Federal Circuit's erroneous construction can be seen in the starkly opposite results reached by courts applying the *Steiner/Alvarez* rule.

This Court's intervention is especially warranted, the petition explained, to vindicate Congress's judgment that federal employees' rights be coextensive with private-sector counterparts' and because of the manifest unlikelihood that the Federal Circuit, which has pending before it thousands of claims raising this

very issue, will correct its rule independently and the significant danger that other courts and employers will follow that court into error.

The government's opposition meets little of this head on. It barely mentions the watershed *Singh* decision or the Labor Secretary's long-held interpretation, and its claim of consistency between the Federal Circuit decisions and this Court's is understandably perfunctory. The opposition expends much more energy arguing about the character of the circuit split and attempting to re-cast the Federal Circuit's opinions, supplying not only fresh legal reasoning, but significantly revised factual statements, as well.

None of these efforts succeeds, let alone detracts from the need for certiorari. That the government resorts to such unconventional surgery is itself testimony to the seriousness of the problems afflicting the Federal Circuit's rule.

A. Although the government (Opp. 9-10) assures the Court "[n]othing in [the Federal Circuit's] decisions suggests" a two-tier interpretation, asserting that "the court of appeals applied the correct legal standard" does not make it so. The opinion in *Adams* actually described its holding as following from a Portal Act rule "specific[] to vehicular travel," 471 F.3d at 1325, and in none of the three decisions did the Federal Circuit even purport to apply the "integral and indispensable" standard for § 4(a)(1) "principal activities." While *Bobo* may have *cited Steiner*, Opp. 10, it announced it would *follow* the Second Circuit's "interpretation" in *Reich*, which pre-dated *Alvarez*'s announcement of the unitary "principal activity" interpretation and had dismissed *Steiner* as

"offer[ing] little guidance as to the meaning of the term 'principal activity or activities,'" 45 F.3d at 649.

The government's claim (Opp. 7) to have found *support* in *Alvarez* for the Federal Circuit rule is mistaken. In the same passage the government cites, which declines to hold waiting to don protective gear a "principal activity," the Court proceeds to explain that the Portal Act "analysis would be different if [the employer] *required* its employees to arrive at a particular time in order to begin waiting," 546 U.S. at 40-42 & n.8 (emphasis added, citing 29 C.F.R. § 790.7(h)).

This distinction, of course, is precisely the one the *Bobo* rule ignores. Like waiting, and clothes-changing, *normal* travel between home and work is merely a "necessary" incident of employment. But *required* driving is different.[1]

Indeed, while required waiting – which *Alvarez* indicated *is* compensable – arguably is "two steps removed from productive activity," 546 U.S. at 42, the activity here, driving, is *itself* work *and* essential to the performance of other job requirements. That is why

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[1]The government's claim that "[e]ven before Congress enacted the Portal-to-Portal Act * * * this Court indicated that 'traveling from workers' homes to [the workplace]' does not qualify as 'work,'" Opp. 7 (quoting *Anderson*, 328 U.S. at 691-692), repeats this mistake. The early decisions involved *optional* (entirely passive) riding, not employer-required driving. Indeed, it was on that basis that the courts denied compensation. See *Walling* v. *Peavy-Wilson Lumber Co.*, 49 F. Supp. 846, 882 (W.D. La. 1943) ("The defendant * * * does not require any employee to use" its transport); *Dollar* v. *Caddo River Lumber Co.*, 43 F. Supp. 822, 823 (W.D. Ark. 1941) (same).

time spent performing this specific activity had, for decades prior to *Bobo*, been recognized as "hours worked." See 45 Fed. Reg. 85,659, 85,661 (Dec. 30, 1980) (describing OPM rule as "consistent with the rulings, interpretations, and opinions of the Department of Labor and the courts in the private sector").

The government offers no explanation how the *Bobo* rule could be consistent with the "principal activity" *holding* in *Steiner*. The requirement in that case did not originate with the employer, and as the petition noted, the clothes-changing and showering surely benefitted the employee more directly than the employer. (The government appears to respond by suggesting that *Steiner* left the "benefit" question open – and might yet be limited to its facts, Opp. 8 n.2). And changing out of clothes is hardly more "indispensable" than driving deemed "essential" – and closely connected – to performance of job duties.

B. Unable to point to evidence in the Federal Circuit opinions of its applying *this Court's* Portal Act test, the government (Opp. 5) posits it applied the Second Circuit's *Reich* version.

But as the petition explained, *Reich* did not involve required driving, and the Second Circuit has now clarified that it did not interpret the Portal Act at all. (Nor did it anticipate cases emphasizing deference to administrative construction, see *Long Island Care at Home Ltd.* v. *Coke*, 551 U.S. 158 (2007)).[2]

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[2]The Opposition (at 14 n.6) accuses petitioners of exaggerating the differences between the cases, saying that "[a]s a practical matter, unless the handler had someone to drive him, he was required to drive." But the *Second*

But even if, as the *Bobo* court wrongly assumed, *Reich* had announced a Portal Act standard for required driving cases (and one in line with *Alvarez*), the Federal Circuit rule could still not be explained or defended as an application of the *Reich* "test." The Federal Circuit's three opinions are devoid of findings – or legal conclusions – respecting any of the *Reich* "factors." And that is no small matter, because in these cases, in which the employer was granted judgment as a matter of law, all three factors – employee choice, indispensability, and employer benefit – plainly *favor* compensation.

C. It is a testament to the difficulty of squaring the Federal Circuit legal rule with this Court's teaching that the Opposition undertakes to reinterpret the *facts* of its cases. The government tells the Court:

> Neither this case, *Adams*, nor *Bobo*, * * * ***involve a requirement that employees commute, nor do they involve a benefit to the government from the employees' commuting.*** The requirement in question is ***only*** that when the employees commute, they utilize government vehicles for this purpose.

Opp. 11 (emphasis added). See also *id.* 8 (describing driving as "accommodat[ing] the employee's choice of where to live"); *id.* 17 (petitioners "received a government car * * * on certain conditions").

But facts are stubborn things, and to the extent these ostensible restatements are given their natural

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*Circuit* did not treat the case as involving required driving, and the practice of car pooling is less exotic than the government assumes. And in *Reich*, there was no rule prohibiting driving with family members or doing personal business on the way to work and back.

meaning – *i.e.*, that the driving at issue was a matter of employee choice, not employer mandate – they are inaccurate.

The *Bobo* opinion states plainly that employees were "*required* * * * to have their dogs reside with them," 136 F.3d at 1466-67, and "*require[d]* * * * to * * * transport" the dogs between "their homes and * * * work locations * * * * [in] specially-equipped vehicles," *id.* (emphasis added). And *Adams* summarized:

> The plaintiffs are issued government-owned police vehicles and ***required as a condition of their employment to commute from home to work in those vehicles.*** This requirement facilitates their ***employers'*** law enforcement ***missions***.

471 F.3d at 1323 (emphasis added).

As for "benefit," at oral argument in *Adams*, the United States forthrightly acknowledged that the driving at issue:

> may benefit the employee in a lot of ways, but we don't dispute ***that the reason it's required is because the government gets enough of a benefit from it that the government chooses to require it.***

Tr. Oral Arg. (Nov. 8, 2006) at 35. Accord 31 U.S.C. § 1344(a)(2)(B),(e)(2) (government vehicles may be driven to employees' homes only if "essential for the safe and efficient performance of * * * law enforcement duties" or it "will substantially increase the efficiency and economy of the Government"); see also *id.* § 1344(e)(1) (unlawful to provide a vehicle for employee "comfort and convenience").

The government's assertion of employee choice – that "commuting" is not "required" – is true only in the literal, entirely trivial sense that employees are not "required" to reside somewhere other than where they work. But the *activity* at issue, driving the employer's vehicles and equipment home, is one employees *must perform* whether they *wish* to or not.[3]

D. In explaining why review is warranted, the petition identified many decisions that have interpreted and applied "principal activities" in Section 4(a)(1) in a manner consistent with this Court's instructions in *Steiner* and *Alvarez* – and therefore at odds with *Bobo*.

The government's response, focused on minimizing the "circuit split" and disparaging its technical "quality," is incorrect on its own terms and misses the larger point.

1. The government builds its argument mostly on the truism that a uniform rule will yield different results in different circumstances. See Opp. 13. But the decisions cited rely on legal standards obviously different from the Federal Circuit's. While the decision below treats required driving "done for the employer's benefit, under the employer's rules" as noncompensable (absent further duties), the Fifth Circuit has held that Section 4(a) *only* exempts activities undertaken "for [employees'] own

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[3]Even if understood as asserting that the *length* of an employee's driving is not employer-mandated, it is not correct; the government *does* mandate the amount of driving: it requires employees to drive its vehicles to their homes, irrespective of where they live, so they may fulfill work responsibilities.

convenience, [and neither] * * * required by the employer [nor] * * * necessary for the performance of their duties," *Dunlop*, 527 F.2d, 394, 398 (5th Cir. 1976). And that formulation is the one the government relies on in its role as enforcer of the statute. See Pet. 28-29. Likewise, questions the Tenth Circuit treats as dispositive to the § 4(a)(1) "principal activity" analysis are ones the Federal Circuit treats as irrelevant, see *Baker*, 146 F.3d at 1219.

As the petition showed (18-21), courts applying Fifth and Seventh Circuit law have reached results directly opposite to the Sixth and Federal Circuits *in cases involving essentially identical facts*, and circumstances the *government* suggests are legally relevant make petitioners' claim of "principal activity," rejected at the threshold under the Federal Circuit rule, far *stronger* than ones that succeeded in other courts.

Even the government does not seriously contend that the Federal Circuit's rule is consistent with *Singh*, in which the court described the required carrying of a briefcase on the subway as "pushing the limits on the burdens [an employer] may impose * * * * before it must pay [employees] for [commuting] time," 524 F.3d at 369.

2. The government notes (Opp. 12-13) that not all the decisions involved driving between home and work. But decisions of the Ninth and Tenth Circuits (as well as district court decisions in *Graham* and *Karr*) did;[4] the Secretary of Labor repeatedly has brought – and

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[4]Although the government stirs up dust about the facts of *Baker*, see Opp. 13 & n.4, the opinion leaves little doubt that the driving was "home-to-work."

prevailed in – enforcement actions in those circumstances; and the opposition unduly minimizes, but cannot deny, that for decades the government-wide rule for federal employees set out circumstances in which time spent driving between "home [and] work" would be "hours worked." See App.63a-64a. The text of § 4(a)(1) speaks to "traveling to and from" the workplace, without specifying the point of origin or terminus. And that the "employer-specified location," Opp. 13 n.3, for driving its vehicle is an employee's home does not make the requirement necessarily less burdensome.

3. The government (Opp. 12) asks the Court to see significance in the absence of a "precedential" appeals court opinion affirming a judgment for plaintiffs. But there is much less to this than is implied. The Tenth Circuit in *Baker* reversed a jury verdict for employers, and employers in the Fifth and Seventh Circuits did not even appeal district court decisions granting employees summary judgment.

This is not an area of the law where there is benefit in allowing judicial disagreement to "percolate." That presumably is why the court in *Singh* did not stop at affirming judgment for the employer, but instead offered guidance: To encourage employers to comply with the law – and thereby make it less likely that "future decisions of the Second Circuit," Opp. 14, would be needed.

Indeed, no valid interest would be served by requiring federal employees to wait for employers elsewhere to defy circuit law and DOL construction, lose in district court and on appeal.

4. The reasons for settling the issue here, in contrast, are compelling. The magnitude of divergence

between the competing interpretations is itself a serious problem, especially because federal employees are relegated to the (erroneous) less-protective rule, and because that rule fails to respect the Secretary of Labor's role in administering the statute.

Moreover, a case directly raising this question, affecting thousands of individual employees, is currently pending in the Federal Circuit. And as the opinion below attests, that court shows no inclination to reconsider its rule, even in the face of *Alvarez* and *Singh*, effectively according *de facto* precedential effect to the certiorari denial in *Adams*.[5]

Finally, leaving the decision in place risks unfairness for employees outside the Federal Circuit. The Federal Circuit's cases are reminiscent of the children's game "telephone," with each successive iteration rendering the initial "message" increasingly unrecognizable. As noted, it is doubtful that the original *Reich* decision was fully consistent with *Alvarez* or with decisions requiring deference to agency construction; *Bobo* then announced a rule, to avoid "conflict" with *Reich*'s "interpretation of the [Portal] Act," that fundamentally misunderstood the Second Circuit's decision. *Adams* extended that error and misread other statutory language; and the decision

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[5]The government likewise hints that denial in *Adams* should control here, claiming there has been no significant "intervening [event]," Opp. 6. But the post-*Adams Singh* decision has washed away the remaining foundations of the *Bobo* rule; and in *Adams*, the government identified case-specific "[j]urisdictional defects" not alleged here as a reason for denying review. Opp., No. 07-116 at 19.

below adhered to these on grounds of "*stare decisis.*"[6] Decisions elsewhere have begun to replicate and extend these errors. See *Rutti* v. *LoJack Corp., Inc*, 2010 WL 699946, *5 (9th Cir. 2010) (relying on *Bobo* in interpreting other statutory language).

E. The petition identified two additional aspects of the Federal Circuit's rule warranting this Court's review: (1) its avowedly differential treatment of FLSA "*exceptions*" – like the Portal Act – and "*exemptions*" and (2) its reliance on a broad, substantive version of the "de minimis" doctrine.

1. As to the first, the government declines even to acknowledge the conflict of authority – or to defend the Federal Circuit's rule. Rather, it attacks a straw man, denying that "everything an employee does is presumed to be compensable work if the employee so characterizes it." Opp. 18. But that is not petitioners' position – or that of the courts of appeals that have rejected the odd rule relied upon below. Rather, it is that when, as here, the employer's claimed relief from the FLSA compensation obligation depends on an "exception," the same rules that govern "exemptions" should apply.

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[6]These misunderstandings have migrated to the regulatory arena – and back. What the court below touted as "authoritative interpretation," App. 12a, is unsigned, undated – generic – text appearing on an OPM web page, which cites *Bobo*, but nowhere mentions the detailed, government-wide rules, affirmed through notice-and-comment rulemaking, it supposedly "supersed[ed]," Opp. 16. The government now defends the Federal Circuit rule as evincing due "deference."

2. The government stops far short of defending the Federal Circuit's "*de minimis*" reasoning, saying only (Opp. 17) there may be "way[s]" other than in time-keeping that "a '*de minimis*' concept might have relevance." But whether or not cases like *Anderson* exhaust the possible "relevance" of the "concept," courts and the government have been careful not to give the extra-statutory de minimis doctrine an expansive scope. See *Dole* v. *Enduro Plumbing, Inc.*, 1990 WL 252270, *6 (C.D. Cal. 1990) ("the *de minimis* doctrine * * * become[s] an issue only after it is first determined that the time is compensable in character"); *Lindow* v. *United States*, 738 F.2d 1057, 1062 (9th Cir.1984) (rule "is concerned with the practical administrative difficulty of [time] recording").

As the Labor Department explained in *Alvarez*, the *de minimis* rule can "thwart[] the purposes of the FLSA," because "almost any activity can be broken down into [noncompensable] constituent parts." Amicus Br., No. 04-66 at 26-27. That danger is dramatically illustrated here. Not only does *Bobo*'s "*de minimis*" analysis consider restrictions and burdens separately, but it inexplicably omits from the calculus the manifold, significant burdens inherent in requiring employees to *drive* work vehicles and equipment between work and home, rather than take public transportation, ride as passengers, or drive their own cars.

## Conclusion

The petition for writ of certiorari should be granted.

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